United States Court of Appeals

for the Second Circuit

APPENDIX

75-7220

United States Circuit Court of Appeals
For the Second Circuit

BALDT CORPORATION,

Plaintiff-Appellee,

v.

TABET MANUFACTURING CO. INC.,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

B

P/5

JOINT APPENDIX

LANDIS, TUCKER & GELLMAN, P.C.
Attorneys for Defendant-Appellant
285 Madison Avenue
New York, New York 10017
(212) 689-7200

OLWINE, CONNELLY, CHASE,
O'DONNELL & WEYHER
Attorneys for Plaintiff-Appellant
299 Park Avenue
New York, New York 10017
(212) 688-0400

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PAGINATION AS IN ORIGINAL COPY

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CIVIL DOCKET
UNITED STATES DISTRICT COURT

JUDGE [illegible]

Jury demand date: **73 CIV. 661**

C. Form No. 106 Re.

TITLE OF CASE	ATTORNEYS
[illegible]ALDT CORPORATION - vs - [illegible]ABET MANUFACTURING COMPANY INC.,	For plaintiff: REAVIS & McGRATH 1 Chase Manhattan Plaza New York, N.Y. 10005 269-7600 For defendant: OLWINE, CONNELLY CHASE O'DONNELL & WEYHER 299 Park Ave., N.Y.C. 10017 (688-0400)

STATISTICAL RECORD

J.S. 5 mailed X

J.S. 6 mailed

Basis of A[illegible] Petition for Removal. Diversity of citizenship Contracts. based upon instrument for payment of money.

Action a[illegible]

COSTS	
Clerk	
Marshal	
Docket fee	
Witness fees	
Depositions	

DATE	NAME OR RECEIPT NO.	REC.	DISB.
2/13/73	Reavis & McG.	15 —	
2/16/73	U.S. [illegible]		15 —
3/3/75	[illegible]	5 —	
3/4/75	[illegible]		5 —

BALDT CORP. - V - TABET MANUFACTURING COMPANY INC., JUDGE [illegible]

73 CIV. 66

DATE	PROCEEDINGS	
[illegible].13-73	Filed Petition for Removal from the State Supreme Court of New York County.	
[illegible].13-73	Filed Undertaking on Removal by Aetna Life & Casualty Surety Company in the sum of $500.00.	
[illegible].15-73	Filed Notice of Deposition of James Hollyer.	
[illegible].20-73	Filed Notice of Motion Ret. 4/6/73 at 2 P.M. ROOM 1904 re: dismiss complaint.	R&M
[illegible].20-73	by plaintiff.	
[illegible].19.73	Filed ANSWER to comp. and request to produce documents.	OCCO&H
[illegible].22-73	Filed Notice of Motion Ret. 4/6/73 at 2 P.M. in ROOM 1904 re: summary judgment	"
[illegible].22-73	Filed Memorandum of Law supporting Pltf's. Motion for summary judgment and answering Defendant's motion to dismiss complaint.	
Apr. 2.73	Filed affdvt. in opposition to Motion for summary judgment.	
Apr. 2.73	Filed deft. memo of law in opposition to motion for summary judgment.	
Apr. 2.73	Filed affdvt. in support of motion to dismiss.	
Apr. 2.73	Filed memo of law in support of motion to dismiss.	
Jun. 20.73	Filed Reply memo of pltf. in support of motion for summary judgment.	
Jun. 20.73	Filed MEMO OPINION # 39586: Deft. Tabet Manufacturing Co., Inc. moves to dismiss the within action for improper service of process. Pltf. Baldt Corp. moves for summary judgment. For the reasons cited infra, both motions are denied. *** It seems clear that at least the terms "Accounts Payable" and "Palmer Liabilities" are ambiguous and that a triable issue of fact exists. *** Tabet's motion to dismiss for improper service and Baldt's motion for summary judgment are denied. So Ordered. TENNEY, J. (7 Pages)(n/m)	
Aug. 1-73	Filed pltff's notice to take deposition of M. Tabet.	
Sep. 7-73	Filed pltff's notice to take deposition of H.D. Burton,	
Jan 22 74	PRE-T[illegible] Judge Tenney	
[illegible]	[illegible]fore [illegible],J.	
[illegible]	[illegible]ial B[illegible] with [illegible] Decision Reserved.	
Jul 16-74	Filed [illegible]	
Jul 22-74	Filed [illegible] post-trial [illegible]	
Jul 31-74	Filed [illegible] Order [illegible] between Pltff and Deft [illegible] sought in action. [illegible], J.	
Aug 6 [illegible]	Filed [illegible] of record of [illegible]	
Dec.24-74	Filed OPINION #41628: Judgment is granted in fa[illegible] of pltff as set forth in the stip & order signed in this court on 7-29-74 in the amounts as indicated. Tenney, J. m/n	
1/31/75	Filed JUDGMENT#75,106. Ordered that pltff recover of deft. sum of $42,397.25 plus int. etc. as indicated. Tenney, J. JUDGMENT ENTERED. Clk. (mn) Ent. 2/6/75	
2/18/75	Filed Bill of Costs taxed in sum of $488.75 in favor of pltff and added to judgment. Clk.	
3/3/75	Filed [illegible] notice of appeal from final judgment of 1/31/75. (mailed notice to [illegible] 3/3/75)	
3/6/75	Filed Pltff's Notice to take deposition of deft.	
4-17-75	Filed supersedeas bond for the undertaking of appeal in the sum of $60,000 (Surety-Ins. of North America).	
4-17-75	Filed stipulation of designation as to the exhibits to be transmitted to the U.S.C.A.	
7/17/75	[illegible] record on appeal certified & transmitted to USCA	

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

BALDT CORPORATION, Plaintiff, -again TABET MANUFACTURING COMPANY, INC., Defendant.	:	NOTICE OF MOTION FOR SUMMARY JUDGMENT IN LIEU OF COMPLAINT

PLEASE TAKE NOTICE that upon the summons, dated January 22, 1973, and the affidavit of James H. Hollyer, sworn to on January 22, 1973, the plaintiff will move this court, at Special Term, Part 1, in Room 130, County Court House, 60 Centre Street, New York, New York, on February 14, 1973, at 9:30 A.M., or as soon thereafter a counsel can be heard, for an order directing the entry of judgment for the plaintiff and against the defendant in the amount of \$46,875 with interest from August 15, 1972, and \$959.83 with interest from November 15, 1972, with and for such other and further relief as to the court may seem just and proper, plus the costs and disbursements of this motion, upon the ground that this action is based upon instruments for the payment of money only which are now due and payable.

PLEASE TAKE FURTHER NOTICE that all answering papers shall be served on the undersigned on or before February 8, 1973.

Olwine, Connelly, Chase,
O'Donnell & Weyher
299 Park Avenue
New York, New York 10017
(212) 688-0400

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- x

BALDT CORPORATION,	:	
Plaintiff,	:	SUMMONS
-against-	:	
TABET MANUFACTURING COMPANY, INC.,	:	
Defendant.	:	

- x

To the above-named defendant:

You are hereby summonded and required to submit to plaintiff's attorney your answering papers on this motion within the time provided in the notice of motion annexed hereto. In case of your failure to submit answering papers, summary judgment will be taken against you by default for the relief demanded in the notice of motion.

The basis of the venue designated is the place of business of plaintiff, which is 1185 Avenue of Americas, New York, New York.

Dated: January 22, 1973

Olwine, Connelly, Chase,
O'Donnell & Weyher
299 Park Avenue
New York, New York 10017
(212) 688-0400

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- x

BALDT CORPORATION,

Plaintiff,

-against-

TABET MANUFACTURING COMPANY, INC.,

Defendant.

- x

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

THANE BENEDICT III, being duly sworn, deposes and says that he is over 18 years of age, is not a party to this action and resides at 24 Skylark Drive, Spring Valley, New York 10977. On January 22, 1973, he served the annexed Summons, Notice of Motion and Affidavit for Summary Judgment in Lieu of a Complaint personally on Tabet Manufacturing Company, Inc., the defendant herein, by delivering a copy thereof to Vincent J. Mastracco, Jr., who, to the best of his knowledge, is the Assistant Secretary of Tabet Manufacturing Company, at the offices of Baldt Corporation, 1185 Avenue of the Americas, New York, New York 10036.

Thane Benedict III

Thane Benedict III

Sworn to before me this

25th day of January, 1973.

Helene H. Rose

Notary Public

HELENE H. ROSE
Notary Public, State of New York
No. 24-3344030
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1973

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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BALDT CORPORATION, :

Plaintiff, :

-against- :

TABET MANUFACTURING COMPANY, INC., :

Defendant. :

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AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT IN LIEU OF A COMPLAINT

STATE OF NEW YORK)
:
COUNTY OF NEW YORK)

JAMES H. HOLLYER, being duly sworn, deposes and says:

1. I am Executive Vice President of Baldt Corporation ("Baldt"), plaintiff in the above-entitled action, and am fully familiar with the facts herein.

2. On July 7, 1971, Baldt entered into an Agreement ("Agreement") with Tabet Manufacturing Company, Inc. ("Tabet"), defendant herein, whereby Baldt agreed to sell its Palmer Electric and Manufacturing Co. Division ("Palmer") to Tabet for certain consideration. A copy of the Agreement is annexed hereto as Exhibit A.

3. The closing for this sale took place on July 7, 1971 at the offices of Olwine, Connelly, Chase, O'Donnell and Weyher, 299 Park Avenue, New York, New York. Thus, the cause of action upon which this motion for summary judgment is based arises out of a contract entered into and executed in New York.

4. A portion of the consideration consisted of

eight notes, all in the amount of $15,625 and due respectively August 15 and November 15, 1971, February 15, May 15, August 15 and November 15, 1972, and February 15 and May 15, 1973. Copies of the notes due November 15, 1972, February 15, 1973 and May 15, 1973 are annexed hereto as Exhibit B.

5. The notes due prior to November 15, 1972 were paid in full and about them there is no controversy. There is still, however, interest due on these notes in the amount of $959.83. This is admitted to by defendant in a letter from his attorney to Baldt, dated November 15, 1972. A copy of that letter and a schedule attached thereto is annexed hereto as Exhibit C.

6. Enclosed in the letter was a check in the amount of $5,538.02 with the endorsement "Final Payment." A copy of that check is annexed hereto as Exhibit D. This check was not, and still has not been cashed by Baldt because of the improper endorsement, since in fact, more than $5,538.02 was due to Baldt from Tabet, and therefore this check was not a final payment.

7. The letter and check purported to pay in full the $959.83 interest due, plus the notes due November 15, 1972 and February 15 and May 15, 1973. These three notes total $46,875.00 in original principal amount, resulting in a gross aggregate of $47,834.83 allegedly due from Tabet to Baldt on November 15, 1972. The letter, however, omits interest due subsequent to August 15, 1972 and improperly states that a total of $42,296.81 is due from Baldt to Tabet as a result of

liabilities previously paid by Tabet to others which Tabet claims it is entitled to offset against the amount due on the notes and interest.

8. This statement is incorrect for two reasons. First, the note due November 15, 1972 does not allow for any set-off against the principal amount of $15,625. Thus, that amount is clearly due and owing Baldt by Tabet. Second, even though the notes due February 15 and May 15, 1973 include the phrase,

> "This note is...subject to set-off as provided for in [the] Agreement",

the Agreement does not permit the set-off sought by Tabet in the November 15, 1972 letter.

9. Section 2.1 of the Agreement states that the Notes given by Tabet to Baldt in connection with the sale of Palmer are "subject to adjustment as set forth in Section 2.2 hereof." Section 2.2 expressly states that Tabet

> "shall assume and satisfy as they mature and become due, all liabilities and obligations of Palmer as they shall exist on the closing date."

A series of exceptions to this statement are then listed:

> "2.2.1 any liability of the Seller for any Federal, state or local taxes based on income or any real property or other taxes as such relate to the retained assets, whether resulting from additional assessments, deficiencies or otherwise, or on account of penalties or interest;
>
> 2.2.2 any liability for inter-company accounts payable by Palmer to the Seller;
>
> 2.2.3 any liability under any pensions, profit sharing, health, accident, insurance or retirement plans, programs or grants of Palmer; and

2.2.4 any liability of the Seller for fees or expenses incurred in connection with this transaction, except as specifically provided in subsections 9.1 and 9.3 hereof."

10. Section 2.3 of the Agreement states that

"In the event that the 'Cash' and 'Accounts Receivable' of Palmer transferred to the Company do not equal or exceed the 'Accounts Payable' of Palmer as at June 30, 1971, then the difference between the 'Accounts Payable' of Palmer and the 'Cash' and 'Accounts Receivable' of Palmer as at such date shall be deducted from the principal amount due under the Notes in inverse order of their maturity. Such account shall be maintained in a manner consistent with that employed in the preparation of the May 31, 1971 balance sheet."

A copy of the May 31, 1971 and the June 30, 1971 balance sheets are annexed hereto as Exhibit E. It is clear from these two balance sheets that the "Accounts Payable" does not include accrued payroll and vacation pay, bond deductions and payroll taxes since all these items are included under separate listings in the balance sheet other than "Accounts Payable." In addition, these items were expressly assumed by Tabet in an Assumption of Liabilities Agreement dated July 7, 1971 and annexed hereto as Exhibit F.

11. Therefore, page two of the schedule attached to defendant's November 15, 1972 letter is incorrect in stating that the total "Accounts Payable" is $151,418.30. The "Accounts Payable" is $117,438.68 as stated both in the June 30, 1971 balance sheet (Exhibit E) and on the first line of page two of the schedule. The other additions to the figure are improper. First, payroll and vacation pay, bond deduction and payroll taxes paid do not belong in "Accounts Payable" as stated <u>supra</u>. Second, the items on page one of the enclosure invoiced after June 30, 1971 clearly do not belong

in "Accounts Payable" as of June 30, 1971 and therefore, without conceding the appropriateness of the other items on that page, at most the "additional payables prior to 7/1/71 not included in above (see separate schedule)" should be $8056.86 instead of $9570.12. That these liabilities were not assumed by Baldt is made even more clear in the Assumption of Liabilities Agreement.

12. Therefore, at most, the "Accounts Payable" is $117,438 less $8,088.27 plus $8056.86, $152.03 and $155.65 totaling $117,714.95.

13. The "Cash Balance" totaled $20,031.99 and the "Accounts Receivable" totaled $98,679.87. Tabet improperly seeks to deduct $2,713.90 as uncollected accounts receivable. However, this deduction is not permitted either in the Agreement (Exhibit A) or the Assumption of Liabilities (Exhibit F). Thus the total of "Cash Balance" and "Accounts Receivable" is $20,031.99 plus $98,679.87 totaling $118,711.86.

14. Therefore, the "Cash" and "Accounts Receivable" of Palmer exceeded the "Accounts Payable" of Palmer and no set-off of any part of the claimed $35,420.44 is permitted.

15. In addition, the set-off of Johnson & Higgins in the amount of $6,876.37 is not permitted because (a) the Agreement does not provide for such a set-off, and (b) this was assumed by Tabet in the Agreement and Assumption of Liabilities.

16. Therefore, $15,625 plus accrued interest was due Baldt by Tabet under the Note due that day. Defendants,

however, defaulted in paying this amount. 11a

17. On December 11, 1972 our attorneys sent a letter on our behalf to Tabet, notifying them of their default in paying the $15,625 plus accrued interest due on November 15, 1972, and demanding that this payment be made within five business days. A true copy of this letter is annexed hereto as Exhibit G.

18. No payment was made within five business days. Each Note included the following express language:

> "In case an Event of Default in the payment of this or any other Note of [Tabet] issued in this series...shall occur and be continuing for five (5) business days after notice, the unpaid balnce of the principal of this Note may be declared and become immediately due and payable."

Pursuant to the provision in these Notes, our attorneys, on our behalf by a letter dated December 28, 1972, annexed hereto as Exhibit H (more than five business days after sending notice to Tabet of its default in paying the $15,625 due November 15, 1972), declared the Notes due February 15, 1973, and May 15, 1973 immediately due and payable. No part of any of the outstanding amount, however, has been paid by Tabet to Baldt.

19. Therefore, under the express terms of the Agreement and the Notes, $15,625 plus interest from August 15, 1972 is due Baldt from Tabet under the Note due November 15, 1972 and $31,250 plus interest from August 15, 1972 is due and owing Baldt from Tabet under the Notes due February 15 and May 15, 1973 which, under their express terms, were made immediately due and payable on December 28, 1972.

20. There is no defense to this action.

WHEREFORE, I respectfully request that an order be entered granting summary judgment in the amount of $46,875 plus interest from August 15, 1972 and $959.83 with interest from November 15, 1972 together with the costs and disbursements of the motion, and such other and further relief as the Court may deem just and proper.

James H. Hollyer

James H. Hollyer

Sworn to before me this
22nd day of January, 1973.

Thomas E. McFarland

Notary Public

THOMAS E. McFARLAND
NOTARY PUBLIC, State of New York
No. 41-7827385
Qualified in Queens County
Term Expires March 30, 1974

AGREEMENT, dated as of July 7, 1971, by and between BALDT CORPORATION, a Delaware corporation (hereinafter called the "Seller"), and TABET MANUFACTURING COMPANY, INC., a Virginia corporation (hereinafter called the "Company").

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, the parties hereto have agreed, and by these presents do hereby covenant and agree, as follows:

1. Sale of Assets.

1.1 On the terms and subject to the conditions set forth in this Agreement, on the Closing Date (as hereinafter defined in Section 3 of this Agreement) Seller shall sell, transfer, assign and deliver to the Company, and the Company shall purchase, acquire and accept from the Seller all of the Seller's interest in and to the assets, business and good will, except for the real property and other assets described on Exhibit A hereto and the buildings and fixtures located thereon and therein, of Seller's Palmer Electric and Manufacturing Co. Division ("Palmer"), of every kind and description, said assets being located at Broadway, Saugus, Massachusetts, including, without limitation, all personal property, tangible or intangible, inventory, patents, trade-

marks and trade names, if any, accounts receivable, cash on hand and in banks in Palmer accounts, advances, deposits, claims of all kinds other than the claims of Seller against Simmons Precision Products, Inc. and any claims on account of tax refunds, rights under contracts, franchise and distributorship agreements, rights to use the name Palmer as a corporate name and otherwise, all other names and slogans used by the Seller in connection with the business or products of Palmer, tools, machinery and equipment, office furnishings and all information and know-how, customers' files and lists, trade secrets, all books and records, and all reports, and other documents prepared by or on behalf of Seller with respect to the business and operations of Palmer, all as the same shall exist on the Closing Date and hereinafter collectively referred to as the "Palmer Assets."

2. Purchase Price and Assumption of Liabilities.

2.1 In addition to the Company's assumption of the liabilities of Palmer to the extent and as hereinafter provided, and as further consideration for the Palmer Assets, on the Closing Date the Company shall deliver to Seller (i) the aggregate sum of $300,000, payable by certified or bank cashier's check or checks payable to the order of Seller, and (ii) the Company's Promissory Notes in the aggregate principal amount of $125,000 in the forms annexed hereto as Exhibits B-1 and B-2 and hereby made a part hereof (the "Notes"),

subject to adjustment as set forth in Section 2.2 hereof.

2.2 Subject to the conditions hereinafter set forth, from and after the Closing Date, the Company shall assume and satisfy as they mature or become due, all liabilities and obligations of Palmer as they shall exist on the Closing Date. Notwithstanding the foregoing, the Company shall not assume, except as set forth on the balance sheets referred to hereinbelow, any of the following liabilities of Palmer:

"B" 2.2.1 any liability of the Seller for any Federal, state or local taxes based on income or any real property or other taxes as such relate to the retained assets, whether resulting from additional assessments, deficiencies or otherwise, or on account of penalties or interest;

2.2.2 any liability for inter-company accounts payable by Palmer to the Seller;

2.2.3 any liability under any pensions, profit sharing, health, accident, insurance or retirement plans, programs or grants of Palmer; and

2.2.4 any liability of the Seller for fees or expenses incurred in connection with this transaction, except as specifically provided in subsections 9.1 and 9.3 hereof. "B"

2.3 The Palmer Assets generally described in

Section 1 of this Agreement and the Palmer Liabilities generally described in Section 2 of this Agreement of Palmer and subject of the sale and assumption agreements pursuant to the terms hereof are and will be set forth on a balance sheet of Palmer dated as at May 31, 1971, with such changes therein as shall occur subsequent to such date in the ordinary course of business, and the Seller shall sell, transfer, assign and deliver to the Company, and the Company shall purchase, acquire and accept all of such assets as the same shall exist on the Closing Date other than the expressly excluded assets and shall assume all of such liabilities as the same shall exist on the Closing Date other than those expressly excluded liabilities. A" In the event that the "Cash" and "Accounts Receivable" of Palmer transferred to the Company do not equal or exceed the "Accounts Payable" of Palmer as at June 30, 1971, then the difference between the "Accounts Payable" of Palmer and the "Cash" and "Accounts Receivable" of Palmer as at such date shall be deducted from the principal amount due under the Notes in inverse order of their maturity. Such account shall be maintained in a manner consistent with that employed in the preparation of the May 31, 1971 balance sheet."A

2.4 Seller undertakes that on or before July 15, 1971, it shall deliver to the Company a balance sheet dated

as at June 30, 1971, representing the assets and liabilities of Palmer as at such date modified as contemplated by subsection 2.3. The Company shall grant Seller reasonable access to the books and financial records of Palmer being transferred hereunder in order to prepare said balance sheet.

3. Closing. (a) The sale and purchase of the business, properties and assets provided for herein (herein called the "Closing") shall take place on the day and year first above written, at the offices of Messrs. Olwine, Connelly, Chase, O'Donnell & Weyher, 299 Park Avenue, New York, New York 10017, at 10:00 a.m. local time (herein sometimes called the "Closing Date"), or at such other place and/or time as may be mutually agreed upon in writing by the parties hereto.

(b) At the Closing, the Seller will deliver to the Company:

(i) bills of sale, endorsements, assignments, drafts, checks and all such other instruments of transfer and assignment as may be required to effect the transfer, assignment and delivery of the Palmer Assets provided for in Section 1 hereof;

(ii) certified copies of the corporate resolutions authorizing the Seller to execute, deliver and perform this Agreement;

(iii) the opinion referred to in Section 7.3 hereof; and

(iv) such other douments, certificates, evidences of consent, opinions and the like as counsel for the Company may reasonably request.

(c) At the Closing, the Company shall deliver to Seller:

(i) certified copies of the corporate resolutions authorizing the Company to execute, deliver and perform this Agreement and the Notes to be issued hereunder;

(ii) an assumption agreement of the Company in form and substance satisfactory to Seller providing for the assumption by the Company of the liabilities of Palmer as provided for in subsection 2.3 hereof;

(iii) the certified or bank cashier's check referred to in Section 2 hereof;

(iv) the Notes referred to in Section 2 hereof;

(v) the opinion referred to in Section 8.3 hereof; and

(vi) such other documents, certificates, evidences of consent, opinions and the like as counsel for the Seller may request.

(d) After the Closing, if and to the extent not obtained prior thereto, the Seller shall use its best efforts to obtain the consent of the other parties to all nonassignable contracts, claims and franchises to the assignment of such items to the Company. If any such consent shall not be obtained, the Seller will cooperate with the Company in any reasonable arrangement designed to provide for the Company the benefits under any such contract, claim or franchise at the cost and for the benefit of the Company, and including the enforcement at the cost and for the benefit of the Company of any and all claims against any party and any and all rights of the Seller against the other party to any such contract, claim, or franchise arising out of or in connection with the breach or cancellation by such other party or otherwise.

(e) The Seller agrees that after the Closing Date the Company shall have the right and authority to endorse without recourse the names of the Seller on any checks or any other evidences of indebtedness received by the Company on account of any accounts receivable or other items of Palmer transferred to the Company hereunder.

(f) Subsequent to the Closing Date for a period not to exceed 120 days the Company shall have the right to occupy the land and buildings of the Seller, all as more

particularly provided in a lease agreement of even date.

4. Brands, Trademarks, Trade Names, Corporate Names. Seller agrees that from and after the Closing, it shall not, directly or indirectly, use or permit any person, firm or corporation controlled or connected with it, directly or indirectly, to use the corporate name Palmer or any of the brands, trade names and trademarks now belonging to or used exclusively by Palmer or any similar name or names or brands or marks.

5. Representations and Warranties of the Seller. Seller represents and warrants to the Company as follows:

5.1 The Board of Directors of the Seller has authorized and approved the execution and consummation of this Agreement and the sale of the business and the Palmer Assets as provided for herein, and this Agreement, when executed and delivered, will constitute a valid and binding obligation of the Seller enforceable against it in accordance with its terms.

5.2 The Seller has on the Closing Date good and valid title to, and the unqualified right to sell, transfer, assign and deliver to the Company, all Palmer Assets to be sold, transferred, assigned and delivered by it to the Company pursuant to this Agreement except for such contracts or purchase orders which may be unassignable without the

consent of the other party thereto. Seller is not in material default under any material assigned contracts.

5.3 The Seller has requested the Company to waive the requirements of the bulk transfer provisions of the Uniform Commercial Code, and the Company has acceded to this request. The Seller will indemnify the Company against all claims made by creditors of the Seller in respect of liabilities not assumed by the Company hereunder.

5.4 Palmer is not a party to any union agreement nor to any litigation other than covered by insurance.

5.5 The accounts receivable of Palmer to be sold and transferred hereunder are bona fide accounts receivable, and are (good and collectible on the Closing Date in their full amount net only of the established reserves on the Closing Date.

6. Representations and Warranties of the Company. The Company represents and warrants to the Seller as follows:

6.1 It is a corporation duly organized, validly existing and in good standing under the laws of the State of Virginia.

6.2. The execution and delivery of this Agreement and of the Notes referred to in Section 2 hereof have been duly authorized by its Board of Directors and when delivered will constitute valid and binding obligations

enforceable against the Company in accordance with their terms.

6.3 The Notes to be issued by the Company to Seller on the Closing Date are not subordinated to any other outstanding indebtedness and obligations of the Company and the Company is not a party to any agreement or arrangement which would or could, with the passage of time, affect their validity or the right of the Company to make payments in accordance with their terms.

7. Conditions Precedent to the Company's Obligations. The obligation of the Company to consummate this Agreement is subject to the following conditions:

7.1 There shall be no material error or omission in the representations and warranties made by the Seller in this Agreement.

7.2 The Seller shall have taken the required corporate proceedings and actions in order to authorize, approve and carry into effect the transactions herein contemplated.

7.3 The Company shall have received from Messrs. Olwine, Connelly, Chase, O'Donnell & Weyher, general counsel for the Seller, an opinion reasonably satisfactory to the Company and its counsel, dated as of the Closing Date, to the effect that all corporate proceedings required to be

taken by the Seller have been taken, and this Agreement is a legally binding agreement enforceable against the Seller in accordance with its terms.

8. Conditions Precedent to Obligations of the Seller. The obligation of the Seller to consummate this Agreement is subject to the following express conditions precedent:

8.1 There shall be no material error or omission in the representations and warranties made by the Company in this Agreement.

8.2 The Company shall have taken the required corporate proceedings and actions in order to authorize, approve and carry into effect the transactions herein contemplated, including, but not by way of limitation, the Notes.

8.3 The Seller shall have received an opinion of Messrs. Canoles, Mastracco, Martone and Barr, counsel for the Company, satisfactory in form and substance to the Seller and its counsel, to the effect that:

8.3.1 the representations and warranties contained in subsections 6.1, 6.2 and 6.3 hereof are true and correct as of the Closing Date; and

8.3.2 all corporate and other proceedings required to be taken by or on the part of the Company

to carry out the terms of this Agreement and the Notes have been duly and properly taken, and this Agreement and the Notes have been duly executed and delivered by the Company and are valid and legal obligations of the Company enforceable against the Company in accordance with their terms.

9. Miscellaneous.

9.1 Expenses. Each of the parties hereto shall pay its own expenses incidental to the preparation and carrying out of this Agreement, whether or not the transactions contemplated hereby shall be consummated, and none of the Seller's expenses (including professional fees) shall be assumed by the Company hereunder nor shall such expenses diminish the assets to be acquired by the Company hereunder.

9.2 Specific Performance. The Seller acknowledges that the assets to be acquired by the Company hereunder are unique and that in the event of a breach of this Agreement by the Seller, the Company will not have an adequate remedy at law, and, therefore, the Seller agrees that the Company shall have the right to enforce its rights hereunder, not only by an action or actions for damages, but also by an action or actions for the specific performance of this Agreement and/or for temporary and permanent injunctive relief without the necessity of proving actual damages.

9.3 Books and Records. Subsequent to the Closing Date, Seller shall have access to the books and records of Palmer being transferred hereunder during normal business hours and shall have the right to make such copies as it deems necessary. Should the Company desire to discard or destroy any of such books and records, it shall first afford the Seller the opportunity of obtaining the same provided the delivery thereof shall be at no cost or expense to the Company.

9.4 Brokerage. The Seller and the Company represent and warrant that none of them has engaged any broker or other person who would be entitled to a brokerage or other fee or commission in respect of the execution of this Agreement and/or the consummation of the transactions contemplated hereby. The Seller shall exonerate, indemnify and hold the Company harmless in respect of any and all claims, losses, liabilities and/or expenses which may be asserted against it by any such other broker or other person on the basis of any such arrangement or agreement made or alleged to have been made by the Seller, and the Company shall exonerate, indemnify and hold Seller harmless in respect of any and all claims, losses, liabilities and/or expenses which may be asserted against it by any such other broker or other person on the basis of any such arrangement or agreement made or alleged to have been made by the Company.

9.5 Entire Agreement, Amendments, Paragraph Headings and Counterparts. This Agreement is the entire agreement between the parties. Except as otherwise specifically provided herein, no change, modification or addition shall be valid unless in writing and signed by or on behalf of all the parties hereto. In addition, neither the Seller nor the Company are making or have made any representations, covenants or warranties with respect to the business, assets and liabilities being acquired by the Company hereunder, except and to the extent specifically contained herein, and the Company hereby represents and warrants that it is fully aware of the business, conditions and operations, including financial conditions, of Palmer. All representations, warranties and indemnifications of the parties hereto shall survive the Closing Date. All paragraph headings are inserted for convenience only. This Agreement may be executed in several counterparts, each of which shall be deemed to be an original and which together will constitute one and the same instrument.

9.6 Assignments. This Agreement shall inure to the benefit of and be binding upon the respective successors and assigns of the parties hereto.

9.7 Notices, Requests, Etc. Any notice, request, instruction or other document given hereunder by any party hereto shall be in writing and delivered personally or sent

by registered or certified mail, postage prepaid.

9.7.1 if to the Seller, addressed to

Baldt Corporation
1185 Avenue of the Americas
New York, New York 10017

Attention of John A. Moran, President

with a copy to

Messrs. Olwine, Connelly, Chase, O'Donnell & Weyher
299 Park Avenue
New York, New York 10017

Attention of Ernest H. Lorch, Esq.

and

9.7.2 if to the Company, addressed to

Tabet Manufacturing Company, Inc.
1336 Ballantine Boulevard
Norfolk, Virginia 23516

Attention of Michael Tabet, President

or to such other address as any party may hereafter designate to the others by notice similarly given. If mailed as aforesaid, notice shall be deemed given when deposited in the United States mails.

9.8 Invalidity of any Provision. In case any one or more of the provisions contained in this Agreement shall be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of such provision in all other respects and of the remaining provisions contained herein shall not in any way be affected or impaired thereby.

9.9 Applicable Law. This Agreement is made pursuant to and shall be governed, construed and enforced in all respects and for all purposes in accordance with the laws of the State of New York.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and delivered by their respective officers thereunto duly authorized as of the day and year first above written.

BALDT CORPORATION

By James H Holler
Ex. Vice President

ATTEST:

Secretary

TABET MANUFACTURING COMPANY, INC.

By
Vice President

ATTEST:

Asst. Secretary

EXHIBIT A

1. All that certain piece or parcel of land, with buildings, improvements and fixtures located thereon and therein, situated in Saugus, Essex County, Massachusetts, more particularly described in Trustees' Deed dated December 24, 1969 from Mark J. O'Friel, Gerald J. Roncolato and Ernest H. Lorch, as trustees under a Declaration of Trust dated June 13, 1966, recorded in Deed Book 5375, Page 434, to Baldt Corporation.

2. Any and all claims of every kind and nature whatsoever of Seller against Simmons Precision Products, Inc.

3. Any and all claims of Seller or Palmer on account of tax refunds or the like.

4. Any and all Prepaid Insurance, Taxes and Other Expenses as shown on Seller's Consolidated Statement of Palmer Electric dated as of May 31, 1971.

5. The financial books and records of Palmer.

6. A vehicle leased by Seller in the possession of John Burke.

TABET MANUFACTURING COMPANY, INC.

Senior Note due

$15,625

New York, New York
July , 1971

TABET MANUFACTURING COMPANY, INC. (the "Company"), a Virginia corporation, for value received, hereby promises to pay to Baldt Corporation or order, the principal amount of $15,625 on with interest (computed on the basis of a 360-day year of twelve 30-day months) on the unpaid balance of such principal amount at the rate of 1% over the "Floating Prime Rate" for short term prime commercial borrowing at Chemical Bank, New York, New York per annum from the date hereof, computed on February 10, May 10, August 10 and November 10 and payable quarterly on each February 15, May 15, August 15 and November 15 after the date hereof, until such unpaid balance shall become due and payable (whether at maturity or at a date fixed for prepayment or by declaration or otherwise), and with interest on any overdue principal (including any overdue prepayment of principal) and premium, if any, and (to the extent permitted by applicable law) on any overdue interest, at the rate of 1% over the "Floating Prime Rate" for short term prime commercial borrowing at Chemical Bank, New York, New York per annum until paid, payable quarterly as aforesaid

or, at the option of the holder hereof, on demand. Payments of principal, premium, if any, and interest shall be made in lawful money of the United States of America at the principal office of the above-named payee or at such other place as the holder hereof shall have designated to the Company in writing.

This Note is one of a series of Notes due between August 15, 1971 and May 15, 1973 of the Company (the "Notes"), originally issued in the aggregate principal amount of $125,000 pursuant to an Agreement, dated July 7 , 1971, between the Company and Baldt Corporation.

In case an Event of Default in the payment of this or any other Note of the Company issued in this series or a breach of said Agreement shall occur and be continuing for five (5) business days after notice, the unpaid balance of the principal of this Note may be declared and become immediately due and payable.

The terms of this Note shall be construed and governed in all respects under and in accordance with the laws of the State of New York.

TABET MANUFACTURING COMPANY, INC.

By________________________
President

TABET MANUFACTURING COMPANY, INC.

Senior Note due

$15,625

New York, New York
July , 1971

TABET MANUFACTURING COMPANY, INC. (the "Company"), a Virginia corporation, for value received, hereby promises to pay to Baldt Corporation or order, the principal amount of $15,625 on with interest (computed on the basis of a 360-day year of twelve 30-day months) on the unpaid balance of such principal amount at the rate of 1% over the "Floating Prime Rate" for short term prime commercial borrowing at Chemical Bank, New York, New York per annum from the date hereof, computed on February 10, May 10, August 10 and November 10 and payable quarterly on each February 15, May 15, August 15 and November 15 after the date hereof, until such unpaid balance shall become due and payable (whether at maturity or at a date fixed for prepayment or by declaration or otherwise), and with interest on any overdue principal (including any overdue prepayment of principal) and premium, if any, and (to the extent permitted by applicable law) on any overdue interest, at the rate of 1% over the "Floating Prime Rate" for short term prime commercial borrowing at Chemical Bank, New York, New York per annum until paid, payable quarterly as aforesaid

or, at the option of the holder hereof, on demand. Payments of principal, premium, if any, and interest shall be made in lawful money of the United States of America at the principal office of the above-named payee or at such other place as the holder hereof shall have designated to the Company in writing.

This Note is one of a series of Notes due between August 15, 1971 and May 15, 1973 of the Company (the "Notes"), originally issued in the aggregate principal amount of $125,000 pursuant to an Agreement, dated July 7, 1971, between the Company and Baldt Corporation. This Note is non-negotiable and subject to set-off as provided for in said Agreement.

In case an Event of Default in the payment of this or any other Note of the Company issued in this series or a breach of said Agreement shall occur and be continuing for five (5) business days after notice, the unpaid balance of the principal of this Note may be declared and become immediately due and payable.

The terms of this Note shall be construed and governed in all respects under and in accordance with the laws of the State of New York.

TABET MANUFACTURING COMPANY, INC.

By____________________________
President

TABET MANUFACTURING COMPANY, INC.

Senior Note due November 15, 1972

$15,625

New York, New York
July 7, 1971

TABET MANUFACTURING COMPANY, INC. (the "Company"), a Virginia corporation, for value received, hereby promises to pay to Baldt Corporation or order, the principal amount of $15,625 on Nov. 15, 1972 with interest (computed on the basis of a 360-day year of twelve 30-day months) on the unpaid balance of such principal amount at the rate of 1% over the "Floating Prime Rate" for short term prime commercial borrowing at Chemical Bank, New York, New York per annum from the date hereof, computed on February 10, May 10, August 10 and November 10 and payable quarterly on each February 15, May 15, August 15 and November 15 after the date hereof, until such unpaid balance shall become due and payable (whether at maturity or at a date fixed for prepayment or by declaration or otherwise), and with interest on any overdue principal (including any overdue prepayment of principal) and premium, if any, and (to the extent permitted by applicable law) on any overdue interest, at the rate of 1% over the "Floating Prime Rate" for short term prime commercial borrowing at Chemical Bank, New York, New York per annum until paid, payable quarterly as aforesaid

or, at the option of the holder hereof, on demand. Payments of principal, premium, if any, and interest shall be made in lawful money of the United States of America at the principal office of the above-named payee or at such other place as the holder hereof shall have designated to the Company in writing.

This Note is one of a series of Notes due between August 15, 1971 and May 15, 1973 of the Company (the "Notes"), originally issued in the aggregate principal amount of $125,000 pursuant to an Agreement, dated July 7 , 1971, between the Company and Baldt Corporation.

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The terms of this Note shall be construed and governed in all respects under and in accordance with the laws of the State of New York.

TABET MANUFACTURING COMPANY, INC.

By /s/ ____________________

Vice President

TABET MANUFACTURING COMPANY, INC.

Senior Note due February 15, 1973

$15,625

New York, New York
July 7 , 1971

TABET MANUFACTURING COMPANY, INC. (the "Company"), a Virginia corporation, for value received, hereby promises to pay to Baldt Corporation or order, the principal amount of $15,625 on Feb. 15, 1973 with interest (computed on the basis of a 360-day year of twelve 30-day months) on the unpaid balance of such principal amount at the rate of 1% over the "Floating Prime Rate" for short term prime commercial borrowing at Chemical Bank, New York, New York per annum from the date hereof, computed on February 10, May 10, August 10 and November 10 and payable quarterly on each February 15, May 15, August 15 and November 15 after the date hereof, until such unpaid balance shall become due and payable (whether at maturity or at a date fixed for prepayment or by declaration or otherwise), and with interest on any overdue principal (including any overdue prepayment of principal) and premium, if any, and (to the extent permitted by applicable law) on any overdue interest, at the rate of 1% over the "Floating Prime Rate" for short term prime commercial borrowing at Chemical Bank, New York, New York per annum until paid, payable quarterly as aforesaid

or, at the option of the holder hereof, on demand. Payments of principal, premium, if any, and interest shall be made in lawful money of the United States of America at the principal office of the above-named payee or at such other place as the holder hereof shall have designated to the Company in writing.

This Note is one of a series of Notes due between August 15, 1971 and May 15, 1973 of the Company (the "Notes"), originally issued in the aggregate principal amount of $125,000 pursuant to an Agreement, dated July 7, 1971, between the Company and Baldt Corporation. This Note is non-negotiable and subject to set-off as provided for in said Agreement.

In case an Event of Default in the payment of this or any other Note of the Company issued in this series or a breach of said Agreement shall occur and be continuing for five (5) business days after notice, the unpaid balance of the principal of this Note may be declared and become immediately due and payable.

The terms of this Note shall be construed and governed in all respects under and in accordance with the laws of the State of New York.

TABET MANUFACTURING COMPANY, INC.

By /s/ ____________________
Vice President

TABET MANUFACTURING COMPANY, INC.

Senior Note due May 15, 1973

$15,625

New York, New York
July 7 , 1971

TABET MANUFACTURING COMPANY, INC. (the "Company"), a Virginia corporation, for value received, hereby promises to pay to Baldt Corporation or order, the principal amount of $15,625 on May 15, 1973 with interest (computed on the basis of a 360-day year of twelve 30-day months) on the unpaid balance of such principal amount at the rate of 1% over the "Floating Prime Rate" for short term prime commercial borrowing at Chemical Bank, New York, New York per annum from the date hereof, computed on February 10, May 10, August 10 and November 10 and payable quarterly on each February 15, May 15, August 15 and November 15 after the date hereof, until such unpaid balance shall become due and payable (whether at maturity or at a date fixed for prepayment or by declaration or otherwise), and with interest on any overdue principal (including any overdue prepayment of principal) and premium, if any, and (to the extent permitted by applicable law) on any overdue interest, at the rate of 1% over the "Floating Prime Rate" for short term prime commercial borrowing at Chemical Bank, New York, New York per annum until paid, payable quarterly as aforesaid

or, at the option of the holder hereof, on demand. Payments of principal, premium, if any, and interest shall be made in lawful money of the United States of America at the principal office of the above-named payee or at such other place as the holder hereof shall have designated to the Company in writing.

This Note is one of a series of Notes due between August 15, 1971 and May 15, 1973 of the Company (the "Notes"), originally issued in the aggregate principal amount of $125,000 pursuant to an Agreement, dated July 7, 1971, between the Company and Baldt Corporation. This Note is non-negotiable and subject to set-off as provided for in said Agreement.

In case an Event of Default in the payment of this or any other Note of the Company issued in this series or a breach of said Agreement shall occur and be continuing for five (5) business days after notice, the unpaid balance of the principal of this Note may be declared and become immediately due and payable.

The terms of this Note shall be construed and governed in all respects under and in accordance with the laws of the State of New York.

TABET MANUFACTURING COMPANY, INC.

By /s/

Vice President

CANOLES, MASTRACCO, MARTONE & BARR
ATTORNEYS AND COUNSELORS AT LAW
1620 VIRGINIA NATIONAL BANK BUILDING
ONE COMMERCIAL PLACE
NORFOLK, VIRGINIA 23510

LEROY T. CANOLES, JR.
VINCENT J. MASTRACCO, JR.
PETER W. MARTONE
STANLEY G. BARR, JR.

TELEPHONE 623-9990
AREA CODE 703

November 15, 1972

RECEIVED
NOV 17 1972
BALDT CORPORATION

Mr. Alfred J. Mason
Treasurer
Baldt Corporation
1185 Ave. of The Americas
New York, N. Y. 10036

Dear Al:

Enclosed are the computation sheets which reflect the balance due Baldt as figured by our certified public accountant.

With respect to the payment that was due on August 15, 1972, I offer the following explanation as to the amount of interest due as of that date:

Interest due to Baldt Corporation:

5/15/72 to 8/15/72 $62,500 @ 6-1/4% (90 da.)	$ 976.56
8/16/72 to 9/18/72 on $15,625 -late payment (33 days @ 6-1/4%)	89.52
TOTAL	$1,066.08
LESS: Paid on a/c interest	- 106.25
NET INTEREST DUE BALDT	$ 959.83 ✓

That figure would correct your calculation of interest due of $1,228.00 in view of your letter of November 9, 1972 wherein you computed interest from August 15 to November 15, 1972 on the total amount due.

The total credit due from Baldt according to the enclosed schedules amounts to $35,420.44 plus $6,876.37 paid to Johnson and Higgins, or a total of $42,296.81. Accordingly, Tabet should be

EXHIBIT C

CANOLES, MASTRACCO, MARTONE & BARR

Mr. Alfred J. Mason
November 15, 1972
Page Two

entitled to the following credit of $35,420.44 previously paid and to which it is entitled an offset. Although entitled to an offset for the amount paid to Johnson and Higgins, the sum was not paid until after the last note payment and accordingly, no interest refund would be due.

INTEREST ON $35,420.44 DUE FROM BALDT CORPORATION:

FROM	TO	DAYS	RATE	AMOUNT
7/1/71	8/15/71	45	6.00%	265.65
8/15/71	11/15/71	90	6.50%	575.58
11/15/71	2/15/72	90	6.50%	575.58
2/15/72	5/15/72	90	6.00%	531.30
5/15/72	8/15/72	90	6.25%	553.44
TOTAL THRU 8/15/72				$ 2,501.55

?

To recap, therefore, the balance due Baldt would be computed as follows:

TOTAL AMOUNT DUE		46,875.00	Balance of notes, including interest
		959.83	int. due on 8/15/72 payment.
		$ 47,834.83	
LESS:			
Johnson & Higgins	6,876.37		
Balance due from Baldt (see statement)	35,420.44	42,296.81	
BALANCE DUE BALDT		$ 5,538.02	

8/15-11/15 ?

Check in the amount of $5,538.02 is enclosed.

Very truly yours,

Vince Mastracco

Vincent J. Mastracco, Jr.

VJMjr:ba
Encl.
cc: Mr. J. H. Hollyer
Mr. John E. Greunke, C.P.A.

Jim
I'm aware of your position

TABET MANUFACTURING CO., INC. D/D/A PALMER ELECTRIC

ACCOUNTS PAYABLE AT 6/30/71 NOT ON LIST

CREDITOR	INVOICE #	INVOICE DATED	AMOUNT
I.B.M.	K506331	5/10/71	27.84
I.B.M.	7R50384	5/27/71	36.05
Nelson Electric Co. (Palmer debit memo of 6/10/71 cancelled)			46.55
New England Telephone Co.			707.81
Massachusetts Electric Co.			293.45
Kinnaman Electric (commission due for May 1971)			73.12
Kinnaman Electric (Commission due for June 1971)			95.17
I.B.M. (Option to purchase typewriter exercised by Palmer effective 6/27/71)	H135177	7/13/71	300.66
Vose-Swain Engraving Co. (received 6/28/71)	E6705	7/15/71	63.67
Dorn Equipment Co. (Back charge and freight charges prior to 6/30/71)	2678	7/7/71	993.49
The Dowd Co., Inc.	6-3072	6/28/71	47.00
Smith's Transfer Corp.	7102578	6/29/71	26.92
Worcester Pressed Steel	13518	6/4/71	2,013.06
Worcester Pressed Steel	13520	6/4/71	2,315.50
S. B. Nelson Electric (shipped 5/7/71 air exp.)	M7892	6/30/71	438.00
Carte Blanche (June charges returned in subsequent statements)			129.22
American Express (June charges returned in 7/22/71 statements)			15.85
North Shore Hardware Co.	11711	6/28/71	2.94
National Car Rental	2163144-4	6/17/71	19.43
DeMamaro Electronics	A47324	5/31/71	14.75
Apparatus Service Company			18.75
F. M. Callahan & Son, Inc.	2046	6/30/71	15.00
Automatic Data Processing	063214	6/30/71	27.00
Automatic Data Processing	063858	6/30/71	27.02
Admiral Brass & Copper	C.M.5575	6/1/71	(- 208.62)
Admiral Brass & Copper	80159	6/17/71	93.12
Brian Supply Co.	BDS8890	8/18/71	5.67
Cramer Electronics (service charge)	X03731	6/30/71	9.90
Texaco, Inc. (May and June charges)		7/13/71	83.94
Western Union		7/6/71	71.50
Warner and Swasey Co. (service charges May & June)			3.70
Mobil oil Co.			53.99
Adell Corp. (freight charges - prior to 6/30/71)			691.97
Mobil Oil (Pre-6/30/71 charges included in subsequent statements)			64.75
Royfax			952.07
			$ 9,570.12

Accounts Payable by agreement Johnson & Higgins paid 8/10/72 6,876.37

TABET MANUFACTURING CO., INC.

COMPUTATION OF AMOUNT DUE FROM BALDT CORPORATION
RE: PURCHASE OF PALMER ELECTRIC MFG. (FIGURES AT MAY 31, 1972)

LIABILITIES ASSUMED OR PAID FOR BALDT		
6/30/71 Payables of Palmer per list originally submitted		$ 117,438.68
LESS: John Hancock (group insurance) deleted		(-8,088.27)
ADD: Additional payables prior to 7/1/71 not included in above (see separate schedule)		9,570.12
6/30/71 Payables as adjusted		$ 118,920.53
6/30/71 Accrued Payroll and Vacation Pay		20,591.18
6/30/71 Employees' Bond Deductions		232.63
Payroll Taxes Paid		11,366.28
Miscellaneous items paid in July & chargeable to Baldt:		
7/1/71 Emil Henker (mortgage and building)		152.03
7/6/71 McCullagh Leasing Co. (Burke's car)		155.65
TOTAL		$ 151,418.30
LESS: CASH BALANCE AT 6/30/71	20,031.99	
*Accounts Receivable (see below)	95,965.87	115,997.86
BALANCE DUE FROM BALDT		$ 35,420.44
*Accounts Receivable per list	98,679.87	
uncollected by Tabet thru 5/31/72	2,713.90	
Balance - Collected	95,965.87	
This includes accrued payroll at June 30, 1971 of		3,010.64
Actual payroll of July 2, 1971 was $6,624.22 and only includes 2 days of July. It would appear that at least 3/5 of this should be accrued		3,974.53
		$ 963.89

PALMER ELECTRIC MFG. CO.

UNCOLLECTED RECEIVABLES - MAY 31, 1972

	INVOICE NO.	DATED	AMOUNT
Brown & Ross of N. J., Inc.	1756	2/23/71	$ 903.20
Harry Gloss	2643	2/18/71	577.50
U.S. Navy - Boston	2259		294.00
Shure Brother , Inc. (balance from prior to Feb. 1971)			163.20
Todd Shipyards	2423	5/4/71	175.00
Todd Shipyards	2816 & 2860		601.00
	TOTAL		$ 2,713.90

TABET MANUFACTURING COMPANY, INC.
1336 BALLENTINE BLVD.
NORFOLK, VIRGINIA 23516

45a

No. 3123

November 15, 1972 68-132/514

PAY TO THE ORDER OF Baldt Corporation $ 5,538.02

THE SUM OF 5538 DOLS 02 CTS DOLLARS

FOR Final Payment

First National Bank
of Norfolk ... A Dominion Bankshares Bank

⑆0514⑈0132⑆ 1 203 0845⑈

EXHIBIT D

BALDT CORPORATION

No. 22

MAY 3 1 1971 19

Statem : of Consolidated 46a

PALMER ELECTRIC Group or Division

ASSETS	Actual	Objective	Variance
In Thousands of Dollars			
Current Assets Transferred and assigned in exa			
Cash	20 amount	40	(20)
Marketable Securities			
Accounts Receivables	104	193	
Less: Allowance for Doubtful Accounts	1	3	
Net Accounts Receivables	103	190	87
Inventories — Gross	705	680	
Less: Inventory Reserve	10	10	
Sub-Total	695	670	(25)
Less: Progress Billings			
Net Inventories			
Prepaid Insurance, Taxes and Other Exp.	16	18	2
Total Current Assets	834	918	XXXXX
Other Assets			
Deposits			
Patents, Trade-Marks, Less Amortization			
Cash Surrender Value of Life Insurance			
Unamortized Noncompete Agreement			
Miscellaneous Accounts Receivable			
Miscellaneous Other Assets			
Total Other Assets			
Property, Plant and Equipment			
Buildings	312	312	
Machinery and Equipment	489	493	4
Less: Depreciation Reserve	107	105	2
Building, Machinery and Equip. - Net	694	700	6
Land	125	125	--
Total Net Property, Plant and Equipment	819	825	6
Inter-Company			
Goodwill	308	308	--
Deferred Charges			
Unamortized Bond Discount and Expense			
Unamortized Organization Expense			
Total Deferred Charges			
Total Assets			XXXX
Cash Transferred To Headquarters			
Total Net Assets	[illegible]961	[illegible]	XXXX
Statistics			
Net Working Capital	699		93)
Accounts Receivables Turnover	12.29		.22
Inventory Turnover	1.80	2.[illegible]	.31

* = Credit Balance in Actual and Objective Columns. EXHIBIT E

BALDT CORPORATION

NO. 22 47a

Financial Condition

[illegible] 19 PALMER ELECTRIC Group or Division

LIABILITIES AND STOCKHOLDERS' EQUITY	Actual	Objective	Variance
In Thousands of Dollars			
Current Liabilities Transferred and assigned in			
Notes Payable exact amount.			
Accounts Payable	96	78	18
Salaries, Wages and Other Compensation	20	10	10
Payroll Taxes and Payroll Withholdings	5	15	(10)
Taxes Other Than Income Taxes	8	9	(1)
Interest			
Other Accrued Expenses	51	27	24
Advance Billings to Customers			
Dividends Payable			
Federal Income Taxes	(80)	(60)	(20)
State Income Taxes	12	24	(12)
Current Portion of Long-Term Debt.	23	23	--
Bonds, Notes and Debentures Owned			
Total Current Liabilities	135	126	
Long Term Debt			
Bonds, Notes and Debentures	160	160	
Less: Payments Year to Date	9	9	
Treasury Bonds, Notes & Debentures			
Current Portion	23	23	
Total Long-Term Debt	128	128	--
Deferred Federal Income Taxes & Pensions	47	45	2
Other Long-Term Liabilities			
Inter-Company	2,057	2,146	(89)
Stockholders Equity			
Preferred Stock			
Common Stock			
Capital Surplus			
Retained Earnings — Prior Years	(325)	(325)	
Retained Earnings — Current Years	(81)	(69)	(12)
Sub-Total			
Less: Treasury Stock			
Total Stockholders Equity			
Total Liabilities and Stockholders Equity	1,961	2,051	(90)
Statistics			
Current Ratio	6.18	7.28	1.10
Long-Term Debt Ratio	--	--	--
Year-To-Date Depreciation & Amortization	21,245	XXXXX	XXXXX

BALDT CORPORATION

No__________

Statement of Consolidated

48a

June 30, 1970 Palmer Electric Group or Division

ASSETS	Total	Sold to Tabet	Retained by Baldt
Current Assets			
Cash	20,031.99	20,031.99	-
Marketable Securities			
Accounts Receivables	98,679.87	98,679.87	-
Less: Allowance for Doubtful Accounts	* 832.66	* 832.66	-
Net Accounts Receivables	97,847.21	97,847.21	-
Inventories — Gross	706,709.83	706,709.83	-
Less: Inventory Reserve	* 12,000.00	* 12,000.00	-
Sub-Total	694,709.83	694,709.83	-
Less: Progress Billings	*	*	
Net inventories			
Prepaid Insurance, Taxes and Other Exp.	16,469.15	-	16,469.15
Total Current Assets	829,058.18	812,589.03	16,469.15
Other Assets			
Deposits			
Patents, Trade-Marks, Less Amortization			
Cash Surrender Value of Life Insurance			
Unamortized Noncompete Agreement			
Miscellaneous Accounts Receivable			
Miscellaneous Other Assets			
Total Other Assets			
Property, Plant and Equipment			
Buildings	312,083.00	-	312,083.00
Machinery and Equipment	488,988.81	488,988.81	-
Less: Depreciation Reserve	* 112,113.87	* 92,179.87	19,934.00
Building, Machinery and Equip. - Net	688,957.94	396,808.94	292,149.00
Land	125,000.00	-	125,000.00
Total Net Property, Plant and Equipment	813,957.94	396,808.94	417,149.00
Inter-Company			
Goodwill	307,994.49	307,994.49	-
Deferred Charges			
Unamortized Bond Discount and Expense			
Unamortized Organization Expense			
Total Deferred Charges			
Total Assets			
Cash Transferred To Headquarters			
Total Net Assets	1,951,010.61	1,517,392.46	433,618.15

Statistics			
Net Working Capital			
Accounts Receivables Turnover			
Inventory Turnover			

—2

* = Contra Balance in Actual and Objective Columns;

* = Unfavorable Effect on Cash in Variance Column.

(BALDT CORPORATION)

NO. 49a

Financial Condition

June 30 1970 — Palmer Electric — Group or Division

LIABILITIES AND STOCKHOLDERS' EQUITY	Total	Sold to Tabet	Retained by Baldt
Current Liabilities			
Notes Payable			
Accounts Payable	117,438.68	117,438.68	-
Salaries, Wages and Other Compensation	20,591.18	20,591.18	-
Payroll Taxes and Payroll Withholdings	12,709.96	12,709.96	-
Taxes Other Than Income Taxes	9,600.00	-	9,600.00
Interest			
Other Accrued Expenses	40,595.71	8,595.71	32,000.00
Advance Billings to Customers			
Dividends Payable			
Federal Income Taxes	(94,269.44)	-	(94,269.44)
State Income Taxes	13,500.00	-	13,500.00
Current Portion of Long-Term Debt.			
Bonds, Notes and Debentures Owned	°	°	
Total Current Liabilities	120,166.09	159,335.53	(39,169.44)
Long Term Debt			
Bonds, Notes and Debentures			
Less: Payments Year to Date	°	°	
Treasury Bonds, Notes & Debentures	°	°	
Current Portion	°	°	
Total Long-Term Debt (Including Current)	149,237.45	-	149,237.45
Deferred Federal Income Taxes & Pension	44,789.00	-	44,789.00
Other Long-Term Liabilities			
Inter-Company	2,064,894.53	-	2,064,894.53
Stockholders Equity			
Preferred Stock			
Common Stock			
Capital Surplus			
Retained Earnings — Prior Years	(325,490.17)	-	(325,490.17)
Retained Earnings — Current Years	(102,586.29)	-	(102,586.29)
Sub-Total	(428,076.46)		(428,076.46)
Less: Treasury Stock	°	°	
Total Stockholders Equity	(428,076.46)		(428,076.46)
Total Liabilities and Stockholders Equity	1,951,010.61	159,335.53	1,791,675.08

Statistics			
Current Ratio			
Long-Term Debt Ratio			
Year-To-Date Depreciation & Amortization		XXXXX	XXXXX

PC—3 °.—Contra Balance in Actual and Objective Columns;

Palmer Electric & Manufacturing
Company
Analysis of Balance Sheet Account
June 30, 1971

I. Prepaid Insurance Taxes and Other Expense

	Sold to Tabet	Retained by Baldt
Prepaid Insurance	$ -	$ 3,756.00
Escraw for Real Estate Tax	-	12,713.15
	$ -	$16,469.15

II. Salaries, Wages & Other Compensation

Accrued Payroll	2,922.44	-
Accured Vacation Payroll	17,668.74	-
	$20,591.18	$ -

III. Payroll Taxes & Payroll Withholding

F.I.C.A. Withheld	1,345.97	-
F.W.T. Withheld	4,446.31	-
S.W.T. Withheld	1,556.26	-
Employee Deduction-Bonds	232.63	-
Accrued Payroll Taxes	5,128.79	-
	12,709.96	$ -

IV. Other Accrued Expenses

Pension	-	32,000.00
Workemns Compensation Insurance	8,595.71	-
	8,595.71	32,000.00

ASSUMPTION OF LIABILITIES

THIS AGREEMENT made and entered into this 7th day of July, 1971, by and between BALDT CORPORATION, a Delaware corporation (hereinafter called the "Seller") and TABET MANUFACTURING COMPANY, INC., a Virginia corporation (hereinafter called the "Company").

W I T N E S S E T H:

WHEREAS, the Seller and the Company have entered into an agreement, dated July 7th, 1971 (the "Agreement") providing for the transfer of certain of the assets, properties and business of Seller's Palmer Electric and Manufacturing Co. Division ("Palmer") to the Company in consideration of cash, notes and the assumption by the Company of all of the liabilities and obligations of Palmer in the amount and manner and on the terms and conditions provided for in the Agreement; and

WHEREAS all of the terms and conditions precedent provided in the Agreement have been met and performed by the respective parties thereto and all of the instruments,

documents and agreements required to be executed and delivered in order to consummate the transaction provided in the Agreement are being executed and delivered by and to the parties of this Agreement concurrently therewith,

NOW, THEREFORE, in consideration of the premises and the transfer by the Company concurrently herewith of certain of the assets and properties of Palmer to the Company in accordance with and pursuant to the Agreement, the Company hereby agrees as follows:

1. The Company, for itself and its successors and assigns, hereby assumes and agrees to pay, perform and discharge all liabilities and obligations of Seller applicable to Palmer referred to in Section 2.3 of the Agreement and, whether or not so set forth or referred to, (i) all obligations of the Company under a lease between the Seller and the Company dated of even date herewith, and (ii) all purchase commitments of Palmer for the purchase of raw materials, supplies, equipment and services and all commitments of Palmer for the manufacture and sale of products and all obligations under all distributorship, franchise and other contracts applicable to Palmer to which Seller is

a party including obligations to Palmer employees (other than such as are specifically excluded under subsection 2.2.3 of the Agreement); in the same manner and to the same extent as if the Company had originally incurred or undertaken such debts, obligations and liabilities in the place and stead of Seller, all in accordance with and pursuant to the terms and conditions provided in the Agreement.

Anything herein to the contrary notwithstanding, the foregoing shall not in any way enlarge the obligations of the Company as set forth in Section 2 of the Agreement.

2. The Company, for itself and its successors and assigns, further covenants and agrees with Seller, its successors and assigns, that the Company and its successors and assigns, will do, execute and deliver, or will cause to be done, executed and delivered all such further instruments, documents, agreements and assurances as may be requested by the Company, its successors and assigns or which may be necessary or desirable in order to evidence and provide for the assumptions by the Company, its successors or assigns, of any one or more of the obligations and liabilities of Seller as they relate to Palmer assumed by the Company hereunder and in accordance with and pursuant to the Agreement.

3. The Company, for itself and its successors and assigns, further covenants and agrees with Seller, its successors and assigns, that the Company and its successors

and assigns will indemnify and hold harmless Sellers, its directors, officers and stockholders from and against any and all losses, liabilities, claims, suits, damages, judgments and expenses (including attorneys' fees) in any way relating to, arising out of or resulting from the debts, obligations or liabilities of Seller as they relate to Palmer which the Company is assuming and paying, performing and discharging hereunder in accordance with and pursuant to the Agreement.

IN WITNESS WHEREOF, the Company and Seller have caused this Agreement to be duly executed by their respective authorized officers and their corporate seals affixed all as of the day and year first above written.

BALDT CORPORATION

By James H. Holler
Exec. Vice President

Attest:

[signature]
Secretary

TABET MANUFACTURING COMPANY, INC.

By [signature]
Vice President

Attest:

[signature]
Asst. Secretary

OLWINE, CONNELLY CHASE, O'DONNELL & WEYHER

299 PARK AVENUE, NEW YORK, N.Y. 10017

212 688-0400

AUL J. CHASE
OHN LOGAN O'DONNELL
ARRY F. WEYHER
EO P. ARNABOLDI, JR.
M. SONDERICKER
RNEST H. LORCH
HARLES M. WATGOOD

ALEXANDER ONDERDONK
HANE BENEDICT III
HARLES A. BONNES
ALTER H. BEEBE
HARLES H. MCCAGHEY
STEPHEN SHEILS
NE GILLESPIE
RENE HOLLYER
CHAEL A. FEIRSTEIN
UL D. DICZOK
HARLES D. DONOHUE, JR.
DITH S. KAYE
OMAS O. DRAPER, JR.
GER H. KISSAM

JAMES E. TOLAN
ROGER MULVIHILL
WIRT P. MARKS, III
JOHN F. WALSH, JR.
LEONARD J. CONNOLLY
EDWARD A. VROOMAN

LEONARD P. HORAN
PAUL D. FREEMAN
ROBERT W. BOYD, JR.
RICHARD F. YOUMANS
MARIJO M. MURPHY
STEPHEN A. MAGIDA
BARBARA E. BOETTCHER
JONATHAN C. LANE
JOSEPH M. BURKE
JOB TAYLOR III
RICHARD D. BELFORD
JOSEPH C. KAPLAN
BRUCE E. PINDYCK

RICHARD E. OLWINE
1913-1954

JOHN E. CONNELLY, JR.
EDWARD F. JOHNSON
COUNSEL

CABLE ADDRESS: OLCONCH

December 11, 1972

Baldt Corporation
Palmer Sale

Dear Sirs:

On November 17, 1972, our client Baldt Corporation received a check in the amount of $5,538.02 purporting to be in full payment of the balance of notes including interest due on November 15, 1972, February 15, 1973 and May 15, 1973, and the interest due on the payment to Baldt by Tabet on August 15, 1972, in connection with the sale of Palmer Electric & Manufacturing Co. to Tabet. Our clients have refused and still refuse to cash the said check because it is improperly endorsed "Final Payment."

As indicated in the letter from your attorneys of November 15, 1972 accompanying the check, the total amount of the balance of the notes and interest is $47,834.83. From this amount, a total of $42,296.81 was deducted as an amount allegedly due Tabet by Baldt.

Under Section 2.1(ii) of the Agreement, dated July 7, 1971 between Baldt Corporation and Tabet Manufacturing Company, Inc., Tabet delivered to Baldt promissory notes in the aggregate principal amount of $125,000. A senior note due November 15, 1972 in the principal amount of $15,625 was delivered to Baldt by Tabet pursuant to the Agreement. Under the express terms of the note, it became due in the amount of $15,625 on November 15, 1972, with interest. This note was not fully paid on November 15, 1972, as required by the Agreement and the Note.

In addition, under the express terms of the notes issued pursuant to the Agreement, if a default in the payment of any note occurs and continues for five business days after notice, the unpaid balance of the principal of the note may be declared and becomes immediately due and payable.

On behalf of our client, we demand that payment be made within five business days in the amount of $15,625 plus accrued interest due under the note payable November 15, 1972. If such payment is not made, we declare the notes due February 15, 1973 and May 15, 1973 immediately due and payable pursuant to their express terms.

We also note that with regard to the senior note due November 15, 1972 in the amount of $15,625, there is no set-off provision allowing for any deduction to be made. Thus, under its express terms, the entire principal plus accrued interest is overdue to Baldt by Tabet. As to the other two notes of February 15, 1973 and May 15, 1973, which will become immediately due and payable if the present default is not corrected within five business days, we have previously stated our position in a letter of February 14, 1972, that the balance claim to be due Tabet by Baldt are expenses that under the Agreement were assumed by Tabet. No set-off at all is therefore allowable from the principal due Baldt from Tabet under these notes.

Therefore, on behalf of the Baldt Corporation, we hereby demand payment in the amount of $15,625 plus accrued interest due as described above. If such payment is not forthcoming within five business days, we have been instructed to declare the notes due February 15, 1973 and May 15, 1973 immediately due and owing and to take whatever legal action is necessary in this regard.

Very truly yours,

Ernest H. Lorch

Michael Tabet, Esq.,
Tabet Manufacturing Company, Inc.,
1336 Valentine Boulevard,
Norfolk, Virginia 23504.

gh
cc: Huges P. Burton, Esq.
James H. Hollyer, Esq.
Alfred J. Mason, Esq.

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

OLWINE, CONNELLY, CHASE, O'DONNELL & WE.HER

299 PARK AVENUE, NEW YORK, N.Y. 10017

212 688-0400

PAUL J. CHASE
JOHN LOGAN O'DONNELL
HARRY F. WEYHER
LEO P. ARNABOLDI, JR.
WM. SONDERICKER
ERNEST H. LORCH
CHARLES M. WAYGOOD
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BRUCE E. PINDYCK

RICHARD E. OLWINE
1913-1954

JOHN E. CONNELLY, JR.
EDWARD F. JOHNSON
COUNSEL

CABLE ADDRESS: OLCONLH

December 28, 1972

Baldt Corporation
Palmer Sale

Dear Sirs:

In our letter to you of December 11, 1972, on behalf of our client Baldt Corporation, we demanded payment by you of $15,625 plus accrued interest on a note due November 15, 1972 given by Tabet Manufacturing Co. to Baldt in connection with the sale by Baldt of Palmer Electric & Manufacturing to Tabet. Such payment has not been made.

Under the express terms of that note, and the notes due February 15, 1973 and May 15, 1973, each in the principal amount of $15,625 and given in connection with the Palmer sale, default on any note continuing for five business days after notice, may, at the option of Baldt, cause all notes to become immediately due and payable.

Accordingly, on behalf of Baldt Corporation and at their instruction, we do now declare the notes due February 15, 1973 and May 15, 1973 immediately due and payable.

On behalf of Baldt Corporation, we demand that payment in the amount of $46,875 plus accrued interest due as described above be made within five business days. If

EXHIBIT H

such payment is not made, we have been instructed to take whatever legal action is necessary in this regard to protect our client's rights.

Very truly yours,

Ernest H. Lorch

Michael Tabet, Esq.,
Tabet Manufacturing Company, Inc.,
1336 Valentine Blvd.,
Norfolk, Virginia 23504.

Copies for: James H. Hollyer, Esq.
Alfred J. Mason, Esq.

hhr

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------------------X

BALDT CORPORATION, :

Plaintiff, : 73 Civ. 661 (CHT)

-against- :

TABET MANUFACTURING COMPANY, INC., : NOTICE OF MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Defendant. :

---------------------------------------X

SIRS:

PLEASE TAKE NOTICE that upon the affidavit of Vincent J. Mastracco, Jr. sworn to on January 31, 1973 annexed hereto, and the prior proceedings herein, the defendant, Tabet Manufacturing Company, Inc., will move this Court at the United States Courthouse, Foley Square, New York, New York in Room 1904 at 2:00 p.m. in the afternoon on April 6, 1973 for an order pursuant to Rule 12(b)(5) F.R.C.P. dismissing the Complaint for insufficiency of service of process and for such other and further relief as may be proper.

DATED: New York, New York
February 15, 1973

Yours, etc.

REAVIS & MCGRATH

By Stephen R. Steinberg
Stephen R. Steinberg
A Member of the Firm
Attorneys for Defendant
1 Chase Manhattan Plaza
New York, New York 10005

TO: Olwine, Connelly, O'Donnell
& Weyher
299 Park Avenue
New York, New York 10017

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BALDT CORPORATION, :

Plaintiff, :

v. : CIVIL ACTION NO.

TABET MANUFACTURING COMPANY, INC., :

Defendant. :

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

STATE OF VIRGINIA,
CITY OF NORFOLK, to-wit:

This day appeared before me, the undersigned, a Notary Public in and for the City and State aforesaid, VINCENT J. MASTRACCO, JR., who, after having been first duly sworn, deposed as follows:

1. That he is a partner in the law firm of Canoles, Mastracco, Martone & Barr of Norfolk, Virginia, counsel for the defendant, Tabet Manufacturing Company, Inc., and at the time of the execution of the contract of July 7, 1971, between the plaintiff and the defendant, he was appointed by a resolution following a special meeting of the directors of the defendant corporation to act as Assistant Secretary of the corporation to attest the signature of H. D. Burton, a Vice President of Tabet Manufacturing Company, Inc., who signed the contract on behalf of the defendant. A copy of said resolution is attached hereto and marked "Exhibit 1".

2. That he is neither an officer, director, stockholder or employee of Tabet Manufacturing Company, Inc. nor is he an agent authorized to accept service of process on behalf of the defendant.

3. That his authority to act on behalf of the defendant was only that authority which is set out in the attached resolution and has never been extended by any action of its Board of Directors.

4. That on January 22, 1973, he appeared in the New York offices of the plaintiff, Baldt Corporation, for the sole purpose of attempting to

settle the controversy giving rise to the instant litigation and in no way agreed to submit himself to the jurisdiction of the State of New York.

5. That while in the offices of the plaintiff and at the close of settlement negotiations, he was handed a copy of the notice of motion for summary judgment in lieu of complaint by Thane Benedict of the firm of Olwine, Connelly, Chase, O'Donnell & Weyher, counsel for the plaintiff. He thereupon advised Mr. Benedict and the Executive Vice President of the plaintiff, Mr. James Hollyer, that he was not an officer of the defendant. They made no attempt to withdraw the complaint.

And further this deponent saith not.

Vincent J. Mastracco, Jr.

Vincent J. Mastracco, Jr.

Subscribed and sworn to before me in my City and State aforesaid this 31st day of January, 1973.

Notary Public

My commission expires: Feb. 25, 1975

I hereby certify that on the day of February, 1973, a true copy of the foregoing was mailed to Olwine, Connelly, Chase, O'Donnell & Weyher, 299 Park Avenue, New York, New York 10017, counsel for plaintiff.

"RESOLVED that Vincent J. Mastracco, Jr. be elected Assistant Secretary of the Corporation for the purpose of executing, along with Hughes D. Burton, Vice President of the Corporation, notes, agreements, and other documents pertaining to the acquisition by the Corporation of the assets of Palmer Electric Company."

* * * *

I, William H. Burton, certify that I am Secretary of Tabet Manufacturing Company, Incorporated, a Virginia corporation, and that the foregoing is a true copy of resolutions which were adopted at a meeting of the Board of Directors of said Corporation duly convened and held on the 6th day of July, 1971.

GIVEN under my hand and the seal of said corporation this 7th day of July, 1971.

William H. Burton

William H. Burton, Secretary

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

BALDT CORPORATION, Plaintiff,	:	73 Civ. 661 (CHT)
-against-	:	**AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION**
TABET MANUFACTURING COMPANY, INC., Defendant.	:	

- -X

STATE OF VIRGINIA)
: ss.:
CITY OF NORFOLK)

HUGHES D. BURTON, being duly sworn, deposes and says:

1. I am Vice President of Tabet Manufacturing Company, Inc. ("Tabet"), the defendant in this action, and submit this affidavit in order to substantiate the affidavit of Vincent J. Mastracco, Jr. which has previously been filed with respect to the motion to dismiss filed by the defendant.

2. Mr. Mastracco is a partner in the law firm of Canoles, Mastracco, Martone & Barr of Norfolk, Virginia, counsel for the defendant, Tabet Manufacturing Company, Inc. Mr. Mastracco accompanied me to New York in July of 1971 to review the contract between Tabet Manufacturing Company, Inc. and Baldt Corporation wherein Tabet was purchasing the Palmer Electric and Manufacturing Division of Baldt Corporation.

3. The basic terms of the contract had been worked out and it was anticipated that the contract would be executed. Therefore, it was necessary that an officer be available at the execution of the contract to attest the signature of the executing officer of Tabet. Pursuant to a resolution of the Board of Directors of Tabet, held at its offices in Norfolk, Virginia, on July 6, 1971, Mr. Mastracco was elected Assistant Secretary of the corporation for the sole purpose of executing, along with

me, the necessary documents pertaining to the acquisition of the Palmer Electric Division of Baldt Corporation. A copy of that resolution is attached to this affidavit. Mr. Mastracco prior to July 6, 1971, was neither an officer nor director of Tabet nor since July 7, 1971, has he been authorized to act nor has he acted as an officer and director of Tabet Manufacturing Company, Inc.. His authority was expressly limited to attesting to my signature in the execution of the documents acquiring the Palmer Division and at no time has he been given authority by the Board of Directors of Tabet to execute any other documents as an officer and director of Tabet or to receive or accept service of process as an officer and director of Tabet.

4. On January 22, 1973, Mr. Mastracco was instructed by me to go to the offices of Baldt to obtain suitable terms to settle the controversy. He was to report back to me as to those terms in an effort to resolve the matter. He was given no authority to bind the corporation, execute any documents on behalf of the corporation or to receive service of process.

Hughes D. Burton

HUGHES D. BURTON

Sworn to before me this

28th day of March, 1973.

Sandra Whiteside

My commission expires: February 25, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BALDT CORPORATION,	:	
Plaintiff,	:	73 Civ. 661 (CHT)
-against-	:	**AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**
TABET MANUFACTURING COMPANY, INC.,	:	
Defendant.	:	

STATE OF VIRGINIA)
: ss.:
CITY OF NORFOLK)

HUGHES D. BURTON, being duly sworn, deposes and says

1. I am Vice President of Tabet Manufacturing Company, Inc. ("Tabet"), the defendant in this action, and submit this affidavit in opposition to the plaintiff's motion for summary judgment in lieu of a complaint. I am fully familiar with the facts relating to this action and I respectfully submit that there is an issue of a material fact which requires a trial on the merits of this action.

2. This action was commenced in the Supreme Court, County of New York by the service of a summons and a motion for summary judgment in lieu of a complaint pursuant to New York State procedure. Service was made upon an attorney who represents Tabet while he was visiting with the plaintiff and its attorneys in an attempt to resolve the dispute.

On February 13, 1973, the action was removed to the United States District Court for the Southern District of New York by the filing of a petition for removal accompanied by a bond with the Clerk of the Southern District of New York. I am advised that on the same day after such filing, a copy of the removal petition was filed with the Clerk of the Supreme Court, County of New York and a notice of removal was served upon counsel for the plaintiff. 572

3. This dispute arises out of the purchase by Tabet of the Palmer Electic and Manufacturing Co. Division ("Palmer") of plaintiff Baldt Corporation ("Baldt") on July 7, 1971. Tabet and Baldt entered into an agreement whereby Baldt sold to Tabet certain enumerated assets of its Palmer Division, then located in Saugus, Massachusetts. In consideration of such sale, Tabet paid to Baldt $300,000 in cash at the closing on July 7, 1971, the date of the agreement, and gave to Baldt eight notes, each in the amount of $15,625, for a total of $125,000. The first note became due on August 15, 1971 with the rest due quarterly thereafter. There is no dispute between the parties with regard to any notes due prior to November 15, 1972. The notes due November 15, 1972, February 15, 1973 and May 15, 1973 are those which the plaintiff herein seeks to declare in default. I respectfully submit that the notes are not in default.

4. Paragraph 2 of the July 7, 1971 agreement, in addition to providing for the cash payment and the giving of the notes in the amount of $125,000, provides that Tabet was to assume the liabilities of the Palmer Division except

for those enumerated in paragraph 2. Paragraph 2.3 of the agreement provides as follows: 88a

> "2.3 The Palmer Assets generally described in Section 1 of this Agreement and the Palmer Liabilities generally described in Section 2 of this Agreement of Palmer and subject of the sale and assumption agreements pursuant to the terms hereof are and will be set forth on a balance sheet of Palmer dated as at May 31, 1971, with such changes therein as shall occur subsequent to such date in the ordinary course of business, and the Seller shall sell, transfer, assign and deliver to the Company, and the Company shall purchase, acquire and accept all of such assets as the same shall exist on the Closing Date other than the expressly excluded assets and shall assume all of such liabilities as the same shall exist on the Closing Date other than those expressly excluded liabilities. In the event that the "Cash" and "Accounts Receivable" of Palmer transferred to the Company do not equal or exceed the "Accounts Payable" of Palmer as at June 30, 1971, then the difference between the "Accounts Payable" of Palmer and the "Cash" and "Accounts Receivable" of Palmer as at such date shall be deducted from the principal amount due under the Notes in inverse order of their maturity. Such account shall be maintained in a manner consistent with that employed in the preparation of the May 31, 1971 balance sheet."

A review of the next to the last sentence of paragraph 2.3 is critical to an understanding of one of the disputes between the parties. The next to the last sentence implies the understanding of the parties with regard to how the purchase price for the transaction was arrived at. It provides for a basic "wash out" of the liabilities assumed against the cash and the receivables. Thus, when the agreement was negotiated, and I participated in the negotiation of this agreement, it was understood between myself and Mr. James H. Hollyer, the plaintiff's executive Vice President, that

the consideration given by Tabet to Baldt was for the inventory, machines and equipment of the Palmer Division. Although Tabet agreed to assume certain liabilities of the Palmer Division, its agreement to assume those liabilities was based upon the understanding reached by the parties that the assumed liabilities would be net of the cash and receivables of the Palmer Division on hand at the closing.

Paragraph 2.3 of the agreement makes reference to the "balance sheet of Palmer as at May 31, 1971", a copy of which I annex hereto as Exhibit A of this affidavit. A review of that document shows that cash and receivables on hand in the Palmer Division as of May 31, 1971 totaled $123,000. The liabilities to be assumed by Tabet totals $121,000. The liabilities assumed net up at $96,000 in accounts payable, $20,000 in salaries, wages and other compensation and payroll taxes and payroll withholdings of $5,000. The May 31, 1971 statement which was prepared by the plaintiff, shows the statement on which we relied in consummating the agreement and clearly shows that the parties intended that the assets and liabilities "wash out". Additionally Baldt and Tabet agreed that if the liabilities increased between May 31, 1971 and June 30, 1971 to a point where they exceeded the assets Tabet would be entitled to set off the excess from the balance due on the notes. Thus, what we did was to net out the assumed liabilities against the cash and the receivables and to pay $425,000 for the inventory and the machinery and equipment of the Palmer Division.

We did not receive any further statements until

August 1971 when we received the June 30, 1971 statement directly from the plaintiff. That statement showed that there was cash of $20,031.99 and accounts receivable of $98,679.87 for a total of $118,711.86 against accounts payable of $117,438.68 salaries, wages and other compensation of $20,591.18 and payroll taxes and payroll withholdings of $12,709.96 for a total of $150,739.82. Thus, as of June 30, 1971, the date provided for in paragraph 2.3 of the agreement for determining whether there would be any offset against the notes, we claim there was an offset due of approximately $32,027.96 the details of which I shall describe later in this affidavit. It should be noted that there is an apparent disagreement between the plaintiff and Tabet with regard to the interpretation of the next to the last sentence of paragraph 2.3 of the agreement. It is this disagreement which forms the basis of the instant dispute. We claim very simply that we are entitled to offset, among other things, from the notes, in inverse order of their maturity, the deficit between the cash and accounts receivable of June 30, 1971 and the accounts payable, salaries, wages and other compensation, payroll taxes and payroll withholdings as of June 30, 1971. The plaintiff claims we are not entitled to that deduction.

As pointed out above, the $425,000 consideration which we agreed to pay for the inventory, machines and equipment of the Palmer Division was based solely upon the value placed upon those assets. The provision of paragraph 2.3 of the

agreement allowing us a set off was based upon the understanding that the accounts receivable and cash as of June 30, 1971 would closely approximate the liabilities which we assumed. Thus, the next to the last sentence of paragraph 2.3 of the agreement allows us a setoff of the excess of the liabilities assumed over the cash and accounts receivable on June 30, 1971. Since both sides to the transaction were dealing with the May 31, 1971 statement prepared by the plaintiff in negotiating and concluding the agreement and since that statement showed $123,000 in cash and accounts receivable and $121,000 in assumed liabilites, the next to the last sentence of paragraph 2.3 was intended to assure Tabet that it would not be paying more than $425,000 for the assets purchased. We did not receive the June 30, 1971 statement until after August 13, 1971, the date it was mailed from Baldt, a month after the closing and therefore we did not know at the closing that there would arise such a great discrepancy between the cash and accounts receivable and the liabilities in one short month. The swing which the next to the last sentence in paragraph 2.3 was intended to protect us against turned out to be $32,027.96, representing an excess of $2,000 as of May 31 and an excess of assumed liabilities over cash and accounts receivable of $32,027.96 as of June 30, 1971.

Plaintiff attempts to read the next to the last sentence of paragraph 2.3 as merely applying to the line "accounts payable" on the May 31 and June 30, 1971 statements.

Using plaintiff's reading, an absurd result would occur. As of May 31, 1971, the accounts receivable and cash totaled $123,000 and the line "accounts payable" was only $96,000. Plaintiff did not intend while we were negotiating to benefit us by $27,000 by transferring to us $27,000 more cash in receivables than liabilities.

The first sentence of paragraph 2.3 of the agreement refers to Tabet's assumption of "the seller's liabilities". The Assumption of Liabilities agreement annexed as Exhibit F to plaintiff's moving papers refers to the "assumption by the Company (the defined term for Tabet) of all of the liabilities and obligations of Palmer in the amount and manner and on the terms and conditions provided for in the Agreement". Both documents speak in terms of all of the liabilities (except for the excluded liabilities) which Tabet assumed. We negotiated the agreement based upon the assumption that the liabilities we assumed as of June 30, 1971 would be no more than the cash and receivables to us and that if they were we would receive a credit for those excess liabiliites in connection with the payment of the eight notes which fell due at quarterly invervals after the closing. Thus, it was our understanding that the term "accounts payable" in the agreement did not refer merely to line items on the May 31 and June 30 statements but refers to actual accounts payable by the Palmer Division. Certainly salaries, wages and other compensation were payables of the Palmer Division when we took it over. Certainly payroll taxes and payroll withholdings were payables of the Palmer

Division when we took over the Division. What we understood paragraph 2.3 of the agreement as attempting to accomplish

was a netting of the cash outflow then due against the cash and receivables. This understanding is further demonstrated by the definitions contained in paragraph 2.2 relating to certain other liabilities of the Palmer Division.

5. The plaintiff in the affidavit of Mr. Hollyer completely ignores the negotiations between Baldt and Tabet by simply relying upon the line items in the May 31 balance sheet. Plaintiff is attempting to ignore the realities of the situation and the clear intention of the parties. Nowhere in plaintiff's affidavit in support of its motion for summary judgment does the plaintiff refer to the intention of the parties. If there is a disagreement with regard to the meaning of paragraph 2.3 of the agreement, then I submit it is inappropriate for this Court to determine the intention of the parties on a summary motion such as this. I am advised by our counsel that we are entitled to discovery on the issue of the intention of the parties so that the meaning of paragraph 2.3 can be presented to a trier of fact. I do not mean to imply that we attack the credibility of plaintiff's Executive Vice President. However, plaintiff's Vice President's affidavit totally omits any discussion of the negotiations leading up to the claim and the mutual intention of the parties. It is very possible, although improbable, that a trier of fact will have to determine whether there was a mutual mistake as to what paragraph 2.3 meant. However, I do not believe that there was such a mistake and I believe that the plaintiff will have to agree that the intention of the agreement was to net out

the cash in as against the cash out. Certainly, it was not the parties intention that we, as buyer, should assume an additional $32,027.96 of liabilities as a result of one month's operations since the May 31, 1971 statement showed cash in as against cash out as almost equal.

6. If plaintiff contends that buyer was to assume this additional $32,027.96 of liability, then I submit that there may have been a material omission in connection with the negotiations which would give us a defense to all of the notes. The agreement was closed on July 7, 1971. The May 31, 1971 statement showed accounts payable of $96,000. However, the June 30, 1971 statement showed accounts payable of $117,438.68, an increase of $21,438.68 or almost 22%. Obviously such a substantial increase in the accounts payable was a material change in the condition of Palmer. If the plaintiff's interpretation is right, that we were to assume and pay for that material change, then I submit that the plaintiff was under an obligation to advise us of that material increase in the accounts payable before consummating the transaction of July 7. The plaintiff did not so advise us of that change and I submit that the reason that the plaintiff did not advise us was because the agreement in paragraph 2.3 contemplated the set-off as outlined in my affidavit. Nor did the plaintiff advise us prior to the closing that there was a decline in the cash and receivables from $123,000 to $117,800. The decline in the cash and the receivables coupled with the increase in the amount

of the payables due as of June 30, 1971 provided the swing of $32,027.96 which we understood was to be a set-off as

against the notes as provided for in paragraph 2.3 of the agreement.

7. The June 30, 1971 statement showed accounts payable of $117,438.68. That amount was incorrect. After taking over the Palmer Division we determined that there was an additional $9,439.92 due creditors of the Palmer Division which was also deducted from the amount due on the notes; a deduction which the plaintiff now claims is incorrect. An analysis of the total of $9,570.12 is contained on page 3 of our counsel's letter to plaintiff dated November 15, 1972 which is annexed to plaintiff's moving papers as Exhibit C. That letter is a reconciliation of the deductions taken from the November 15, 1972 note which the plaintiff claims is in default by reason of the deductions. Certainly, paragraph 2.3 of the agreement, even under plaintiff's analysis, would allow for that deduction since the total of the line "accounts payable" of $117,438.68 as against the total cash in accounts receivables of $117,879.20 leaves only a credit of $440.52 as against the additional receivables of $9,570.12. (This calculation is assuming that the only offset was to be in connection with the line accounts payable.)

8. In the May 30, 1971 statement there is an item entitled "salaries, wages, and other compensation of $20,000. In the June 30, 1971 statement, that amount is

stated to be $20,591.18. It actually turned out to be accrued payroll and vacation pay and not current payroll as represented. The amount was never disclosed to us during the negotiations or in the May 30, 1971 statement upon which the negotiations were based as accrued payroll and vacation pay. Tabet has received substantial claims by former employees of Palmer who claim that Tabet is obligated to pay their accrued vacation pay as a liability assumed pursuant to the agreement. As such, Tabet is entitled to deduct this amount from the notes pursuant to the setoff provision contained in paragraph 2.3 of the agreement.

In addition to the items above, further items described as employees' bond deductions in the amount of $232.63 and payroll taxes which have been paid in the amount of $11,366.28 are items that qualify pursuant to the agreement as liabilities assumed which Tabet is entitled to deduct from the balance due on the notes. Three further items which were not disclosed as accounts payable, namely, Emil Henker in the amount of $152.03, McCullagh Leasing Co. in the amount of $155.65, and an insurance liability of $6,876.37 to Johnson & Higgins, were undisclosed as payables to be assumed by Tabet. In addition, Baldt refused to recognize these items as those subject to offset contrary to the provisions of the agreement.

9. It is interesting to note the difference between the payroll taxes shown on the May 31, 1971 as opposed to that which appears on the June 30, 1971 statement. The May 31, 1971 statement shows payroll taxes at $5,000. The June 30, 1971 payroll taxes are $12,709.90. The difference of $7,709.96 represents an increase of over 150%. If plaintiff's reasoning is to be taken at face value, then Tabet as the buyer, would have to absorb this rather enormous one month increase. Tabet relied upon the May 31, 1971 statement and sought to protect itself against any such increase by providing in the agreement that all of the cash out assets at June 30, 1971 would be offset against the cash in items of June 30, 1971. Plaintiff's reasoning would have us absorb an increase of over 150% during a one month period. The increase was occasioned during the plaintiff's operation of the business and according to plaintiff's assertions Tabet is without any right of recourse against it. Paragraph 2.3 of the agreement was negotiated for the purpose of allowing Tabet to protect it against such increases. When we closed on July 7, 1971 Tabet did not know the financial condition of Palmer of June 30, 1971.

10. One of the assets transferred to Tabet pursuant to the agreement was Palmer's receivables as

of June 30, 1971. Paragraph 5.2 of the agreement, which contains the representations and warranties of the seller, provides:

> "5.2 The Seller has on the Closing Date good and valid title to, and the unqualified right to sell, transfer, assign and deliver to the Company, all Palmer Assets to be sold..."

Paragraph 5.5 which also relates to the representations and warranties of the seller, provides:

> "5.5 The accounts receivable of Palmer to be sold and transferred hereunder are bona fide accounts receivable, and are good and collectible on the Closing Date in their full amount net only of the established reserves on the Closing Date."

The June 30, 1971 statement shows accounts receivable of $98,679.87 as of May 31, 1972, $2,713.90 of the receivables proved uncollectible and as of the date of this affidavit have in fact not been collected. Additionally there are customer claims with regard to certain of the receivables from the period of operation of the Division by the plaintiff. Since the plaintiff guaranteed the collectibility of those receivables, we are entitled to and have taken a set off against the notes.

11. In accordance with our counsel's letter of November 15, 1972 (annexed plaintiff's moving papers as Exhibit C), we tendered our check for $5,538.02 with the

endorsement "Final Payment". Included within that check was interest due on the November 15, 1972 note. Based upon the credits which we deducted pursuant to paragraph 2.3 of the agreement we have paid all of the interest which is due to plaintiff on the notes and plaintiff's claim that we are in default of interest is not correct.

12. The November, 1972, February, 1973, and May, 1973 notes were in the amount of $15,625 each for a total of $46,875. In addition we computed the interest due, based upon the credits of $959.83, for a total of $46,834.83 due as of November 15, 1972. From that, we took a total credit of $42,296.81 leaving a balance due of $5,538.02. The credits were to be taken in inverse order of maturity of the notes. Since only $5,538.02 was due in its entirety, the May 15, 1973 and the February 15, 1973 note should be cancelled. The February and May notes were for a total principal amount of $31,250. The balance of the credit of $11,046.81 was applied to the November, 1972 note for $15,625 plus interest of $959.83. Thus leaving a total of $5,538.02 due to Baldt as of November 15, 1972.

13. Thus, we respectfully submit that the tender of the check of $5,538.02 was in full satisfaction of Tabet's obligation to the plaintiff pursuant to the agreement and the notes. Plaintiff claims otherwise. Baldt asserts that the agreement does not provide for the credits and offsets discussed in this affidavit. Such a claim, I respectfully submit, requires a determination of the intention of the parties

with regard to the negotiation and execution of the agreement. The plaintiff ignores the fact that it failed to disclose two material items -- the $20,591.18 due as accrued payroll and vacation pay and the $9,570.12 of additional trade accounts due as of June 30, 1971, neither of which appeared on the May 31, 1971 statement. If the failure to disclose those two amounts is not, at trial, determined by the trier of fact to be a material omission, at the very least these items are allowable as offsets against the notes as was agreed. There are, I respectfully submit, material issues which require a full trial. Summary judgment should not, I respectfully submit be granted in these circumstances. Tabet tendered payment of all that is due the plaintiff.

Hughes D. Burton
HUGHES D. BURTON

Sworn to before me this
28th day of MARCH, 1973

Sandra Whiteside
Notary Public

My commission expires: February 25, 1975

(7)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BALDT CORPORATION, Plaintiff, -against- TABET MANUFACTURING COMPANY, INC., Defendant.	73 Civ. 661 (CHT) #39586 MEMORANDUM

TENNEY, J.

Defendant Tabet Manufacturing Company, Inc. (hereinafter "Tabet") moves pursuant to Fed. R. Civ. P. 12(b) to dismiss the within action for improper service of process. Plaintiff Baldt Corporation (hereinafter "Baldt") moves for summary judgment pursuant to Fed. R. Civ. P. 56. For the reasons cited infra, both motions are denied.

On July 7, 1971, Baldt and Tabet (a corporation organized under the laws of the State of Virginia and maintaining its principal place of business there) entered into an agreement whereby Baldt sold to Tabet its Palmer Electric and Manufacturing Co. Division (hereinafter "Palmer"). At the closing of the sale, which took place in New York City on that same date, the agreement was signed by Hughes D. Barton, a Vice-President of Tabet, and attested to by Vincent J. Mastracco, Jr., as Assistant Secretary of Tabet. Part of the consideration for the sale consisted of eight notes, each in the amount

of $15,625 plus accrued interest, and due, respectively, August 15 and November 15, 1971; February 15, May 15, August 15 and November 15, 1972; and February 15 and May 15, 1973. The principal amounts of the notes due prior to November 15, 1972, were paid in full. The notes due November 15, 1972, February 15 and May 15, 1973, are those which Baldt herein seeks to declare in default.

Tabet's motion to dismiss the action for improper service requires only brief comment. The present action was commenced in the Supreme Court of the State of New York, County of New York on January 22, 1973, with service upon Tabet of a Summons and Notice of Motion for Summary Judgment in Lieu of Complaint pursuant to N.Y. C.P.L.R. § 3213 (McKinney 1970). Service upon Tabet was made by service on Vincent J. Mastracco, Jr., Esq., Assistant Secretary of Tabet. Thereafter the action was removed by Tabet to this United States District Court. Tabet contends that service of process upon Mastracco was improper since Mastracco, an attorney for the corporation, had been elected as Assistant Secretary on July 6, 1971, solely for the purpose of executing, along with the Vice President of Tabet, notes, agreements, and other documents pertaining to the acquisition by Tabet of the Palmer assets. There is, however, no evidence that Mastracco resigned or otherwise terminated his office between July 6, 1971, and January 22, 1973. Section 311[1/] of N.Y. C.P.L.R. (McKinney 1972) states in relevant

part:

> "Personal service upon a corporation ... shall be made by delivering the summons as follows:
>
> 1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service .... "

There can be no dispute that an assistant secretary is an "officer" of the corporation within the meaning of § 311. Since Mastracco was still an officer at the time he was served, the original purpose behind his election some eighteen months earlier is hardly relevant. Moreover, when he was served, he was attending a meeting in New York on behalf of Tabet at the offices of Baldt in an attempt to settle the controversy giving rise to the instant litigation. Even if it could be argued that service did not comply with the literal terms of the applicable statute, it certainly gave fair and adequate notice to Tabet of the commencement of an action against it. Accordingly, the motion to dismiss for improper service must be denied.

Turning now to Baldt's motion for summary judgment, it seems clear that even though no complaint has been filed in this court, a motion for summary judgment can be entertained. Istituto Per Lo Sviluppo Economico Dell' Italia Meridionale v. Sperti Products, Inc., 47 F.R.D. 310, 312 (S.D.N.Y. 1969). In this connection, it also is clear that the action was properly brought in the state court pursuant to N.Y. C.P.L.R. § 3213 since the notes upon which the action is based are clearly in-

struments for the payment of money only, within the terms of that statute. However, the motion for summary judgment herein must be determined by federal standards. Istituto Per Lo Sviluppo Economico Dell' Italia Meridionale v. Sperti Products, Inc., supra, 47 F.R.D. at 316.

Under the agreement of July 7, 1971, already referred to, Baldt agreed to sell certain enumerated assets of Palmer to Tabet, and Tabet agreed to assume the liabilities of Palmer to the extent provided therein. Reference was made to the May 31, 1971, balance sheet of Palmer. In consideration of the sale Tabet paid to Baldt $300,000 in cash at the closing on July 7, 1971, and also gave Baldt the eight notes totalling $125,000 referred to supra. With respect to the assumption by Tabet of Palmer's liabilities, paragraph 2.3 of the agreement stated that

> "[i]n the event that the 'Cash' and 'Accounts Receivable' of Palmer transferred to [Tabet] do not equal or exceed the 'Accounts Payable' of Palmer as at June 30, 1971, then the difference between the 'Accounts Payable' of Palmer and the 'Cash' and 'Accounts Receivable' of Palmer as at such date shall be deducted from the principal amount due under the Notes in inverse order of their maturity. Such account shall be maintained in a manner consistent with that employed in the preparation of the May 31, 1971 balance sheet."

It is the contention of Tabet that the parties used the May 31, 1971, balance sheet as the basis for the sale negotiations and that that balance sheet indicated that the accounts payable netted out against cash and accounts receivable. Tabet further contends that it was purchasing the assets of Palmer

for a total of $425,000 made up of the cash and notes referred to, and no more--and that since the agreement was originally to close on July 1, 1971, it was provided that if the June 30, 1971, statement showed that the accounts payable assumed by Tabet exceeded cash and accounts receivable, it would have the right to set off and deduct any excess accounts payable from the principal amount of the notes.

When Tabet received the June 30, 1971, balance sheet of Palmer in August 1971 after the closing, it discovered that that balance sheet showed markedly different amounts than those disclosed on the May 31, 1971, balance sheet in that the liabilities of Palmer exceeded cash and receivables by over $42,000 on June 30, 1971, whereas they had netted out on the May 31, 1971, balance sheet. Accordingly, it attempted to set off the overage against the $46,875 due on the notes, thereby precipitating the instant law suit.

It seems clear from the affidavits filed herein that interpretation of the agreement between Tabet and Baldt cannot be determined on a motion for summary judgment. For example, Baldt contends that the term "Accounts Payable" does not include accrued payroll and vacation pay, bond deductions and payroll taxes since these items are included under separate listings other than as "Accounts Payable" in the balance sheet. On the other hand, Tabet contends that the term "Accounts Payable" in the agreement did not refer merely to line items on

the May 31 and June 30, 1971, balance sheets but refers to actual accounts payable by Palmer. Further, Tabet contends that the term "Palmer Liabilities" means only the line item "Accounts Payable", that, accordingly, Tabet had no right to a set off as of the closing date, and, in effect, that the $41,000 overage was part of the consideration for the consummated sale.

It seems clear that at least the terms "Accounts Payable" and "Palmer Liabilities" are ambiguous and that a triable issue of fact exists. Painton & Co. v. Bourns, Inc., 442 F.2d 216, 233 (2d Cir. 1971); Aetna Casualty & Surety Co. v. Giesow, 412 F.2d 468, 471 (2d Cir. 1969); Lemelson v. Ideal Toy Corp., 408 F.2d 860, 864 (2d Cir. 1969).

Tabet's motion to dismiss for improper service and Baldt's motion for summary judgment are denied.

So ordered.

Dated: New York, New York

June 18, 1973

Charles H. Tenney

U.S.D.J.

BALDT CORPORATION,
Plaintiff,
-against-
TABET MANUFACTURING COMPANY, INC.,
Defendant.

73 Civ. 661 (CHT)

FOOTNOTE

1. The question of whether proper service of process was made must be determined on the basis of New York law. Electronic Race Patrol, Inc. v. National Trailer Convoy, Inc., 191 F. Supp. 364 (S.D.N.Y. 1961).

ards

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

--------------------------------------x

BALDT CORPORATION,

Plaintiff,

-vs-

TABET MANUFACTURING CO., INC.,

Defendant

--------------------------------------x

73 Civ. 661

TRANSCRIPT OF TRIAL

Before:

HON. CHARLES H. TENNEY,
District Judge

New York, New York
June 14, 1974--10:50 a.m.

APPEARANCES:

OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER, ESQS.,
Attorneys for the Plaintiff
BY: JUDITH S. KAYE, ESQ., and
JOSEPH C. KAPLAN, ESQ., of Counsel

REAVIS & McGRATH, ESQS.,
Attorneys for the Defendant
BY: JAMES R. COLEY, ESQ., of Counsel

ards

THE COURT: I don't have a pre-trial memorandum from the defendant but I do from the plaintiff.

MR. COLEY: I represent the defendant and my name is James Coley. I was under the impression when we were last in your Honor's chambers we would file post trial briefs if necessary in the matter.

THE COURT: All right. I assume everybody is going to file a post trial brief.

MR. COLEY: We raised the issue as to the parole evidence rule and the admissibility of parole evidence and ambiguity.

THE COURT: You already have a ruling by the Court of possible ambiguity that would seem to dispose of that issue.

MR. COLEY: Thank you.

MRS. KAYE: May I make a brief statement? My name is Judith Kaye and I am representing Baldt Corporation which is the plaintiff in this action. As you know, this suit is based on a purchase agreement where Baldt sold to the defendant, Tabet, a business known as Palmer Electric, a division of Baldt on July 7, 1971 and the defendant Tabet assumed certain current liabilities of Palmer and also agreed to pay Baldt the sume of $425,000, $300,000 in cash and $125,000 in a series of eight notes payable quarterly.

Tabet has defaulted on the payment of the last three notes and that is the amount in contest in this case.

THE COURT: I have had the motion for a summary judgment and I know what the facts are, the alleged facts.

MRS. KAYE: I want to have a very brief statement about the issue of ambiguity and parole evidence in the light of your Honor's ruling and, of course, we are here today to present evidence on the issue of ambiguity and we have had discovery which the defendant felt was necesssary and we are here to tell our story.

We do wish to state our position that we hope you will find that the contract is clear on its face and that you will find that by virtue of the interpretation clause and the as is clause, both of which are clearly set out in that agreement that extrinsic evidence of fraud and extrinsic evidence which would seek to alter the terms of this contract are improper and inadmissible. We will have objection to the introduction of such evidence by the defendant.

THE COURT: On the issue of fraud you mean, fraud in the inducement?

MRS. KAYE: It is hard to say since, as you know, this was brought on as a motion for summary judgment in lieu of a complaint and we don't actually have a complaint and an answer in this lawsuit and all we have is the aroma of

ards

fraud and the opposition papers of the defendant to suggest that.

THE COURT: You mean there is no allegation but really an aroma of fraud?

MRS. KAYE: The defendant says if indeed the contract means what it says, then he was misled and this issue we feel most strongly --

THE COURT: We don't have a jury but I am not going to get into a lengthy discussion of fraud.

MRS. KAYE: Your Honor, we would like to call our first witness, Mr. James Hollyer.

THE COURT: I would like to refresh myself with respect to the pleadings in this case.

MRS. KAYE: You don't have any pleadings, we have a motion for summary judgment in lieu of the complaint.

THE COURT: Based on the pleadings in the State Court?

MRS. KAYE: No, which was brought in the State Court by that procedure. There never actually was a complaint and never actually an answer and the defendant's opposition is stated in his opposition to the motion for summary judgment.

MR. COLEY: I think we might be able to clear this up, I don't think we are going to proceed on the question

of fraud and I think your Honor is correct at this point and all that we have in terms of the contract is whether there is any ambiguity as to what the parties meant by these terms.

THE COURT: All right, that clarifies that.

I usually try cases on the basis of a complaint and an answer.

MRS. KAYE: This is a bit unorthodox.

THE COURT: If the parties don't object, I think the proper procedure would have been after motion for summary judgment was denied is to file a complaint and an answer. We will go ahead the way we are.

J A M E S H. H O L L Y E R, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MRS. KAYE:

Q Mr. Hollyer, what is your present employment?

A President of Baldt Corporation.

Q Did you have that same employment in July of 1971?

A In July of 1971 I was executive vice-president of the corporation.

Q Will you briefly describe your responsibilities in July 1971?

A Yes. I was chief operating officer of the corporation and staff functions in New York City and the head of our operating units reported to me.

Q What is the business of Baldt?

A We are a public company and we have four lines of business. We are the country's only manufacturer of heavy duty anchor chains for ships. We have a business which makes yarn packages of fine denier nylon and polyester and we do plastic engineering and plastic parts production and we have a tire division business.

Q What was Baldt's sales and net income during 1973?

A 1973 the sales were $23,950,000 and the earnings were $571,000.

Q Is it a listed company?

A Over-the-counter.

Q Did you at one time own what was known as Palmer Electric & Manufacturing Company?

A Yes.

Q Do you still own that?

A No.

Q What was the business of Palmer?

A A manufacturer of shipboard electrical enclosures, large metallic enclosures which contained electrical components such as switches, relays, the purpose of which

was to shield these electrical componenets from severe seas, water and other environment on board ships.

Q When did you dispose of Palmer?

A July 7, 1971.

Q At that time, Mr. Hollyer, who was your largest competitors?

A The larges competitor was Tabet Manufacturing. There was a company called Nelson that competed to a somewhat lesser degree and also a company called Betts which went out of business roughly in that period.

Q Tabet is the defendant in this action?

A Correct.

Q Did Baldt purchase the business of Palmer from someone else or start up the business?

A No, Baldt purchased that business prior to my joining the company, but it purchased it in October 1st of 1969, I believe, for somewhat over $2,000,000 in cash.

Q How much was the business sold to Tabet for?

A $425,000.

MRS. KAYE: I would like at this time to have this marked for identification, an agreement dated July 7, 1971 between Baldt and Tabet.

xx [Plaintiff's Exhibit 1 marked for Identification]

THE COURT: I take it there is no objection?

MR. COLEY: No objection.

xx [Plaintiff's Exhibit 1 received in Evidence]

MRS. KAYE: I would like to offer an agreement called assumption of liabilities dated July 7, 1971.

MR. COLEY: No objection.

THE COURT: Received.

xx [Plaintiff's Exhibit 2 received in Evidence]

MRS. KAYE: I would like to offer in evidence a statement of consolidated financial condition of Palmer Electric dated May 31, 1971.

MR. COLEY: Your Honor, I believe that is an exhibit to the agreement, is that correct?

MRS. KAYE: Since it is appended it is most assuredly referred to.

MR. COLEY: No objection.

THE COURT: Received.

xx [Plaintiff's Exhibit 3 received in Evidence]

MRS. KAYE: I would like to offer as Plaintiff's Exhibit 4 a statement of consolidated financial condition of Palmer Electric as of June 30, 1971.

MR. COLEY: No objection.

xx [Plaintiff's Exhibit 4 received in Evidence]

MRS. KAYE: May the whole thing be marked including the letter attached to it?

THE COURT: All right.

MR. COLEY: No objection

THE COURT: The agreement itself is Exhibit 1, the assumption of liabilities is Exhibit 2, the statement of May 31 is Exhibit 3 and we have now Exhibit 4?

MRS. KAYE: We do, your Honor, and that is a letter dated July 22, 1971 to Tabet Manufacturing Company enclosing the statement of consolidated financial condition of Palmer as of June 30, 1971.

THE COURT: There is no objection?

MR. COLEY: No.

Q Looking at Exhibit 1, Mr. Hollyer, is that the agreement entered into between the parties for the sales of Palmer?

A Yes.

Q Exhibit 2, could you tell us what that is, please?

A The assumption of liabilities in connection with the same transaction.

Q Can you identify Exhibit 3, sir?

A Yes. Exhibit 3 is the statement of consolidated financial position of Palmer Electric as of May 31, 1971.

Q I call your attention, Mr. Hollyer, to page 3 of Exhibit 1, the provision 2.3 which continues onto page 4 and you will note it refers to the balance sheet dated as

of May 31, 1971.

Is this the balance sheet to which reference is made in the agreement?

A Yes, it is, Exhibit 3.

Q There appears to be some handwriting on Exhibit 3. Can you identify that handwriting?

A Yes, I can.

Q On page 1?

A On page 1, in the upper corner the initials of Hughes Burton and myself.

Q Who is Hughes Burton?

A Vice-president and general manager of Tabet Manufacturing.

Q Do you know when those initials were placed on page 1?

A At the time of the closing on July 7, 1971.

Q Is there handwriting on page 2 as well?

A Yes, on page 2.

Q What is that?

A The same sets of initials.

Q Were those placed at the same time?

A Yes, sir, also at the same time as were the inked lines that appear in the far right columns were placed on there.

MR. COLEY: May I see if this is the original? Thank you.

Q Turning to Exhibit 4, Mr. Hollyer, I would like to call your attention to the provision in the agreement Exhibit 1 designated 2.4 beginning on page 4 and you will note that that paragraph reference is made to a balance sheet as at July 30, 1971.

Is Exhibit 4 the balance sheet referred to in that paragraph?

A Yes, it is.

Q Were both of those sheets to your knowledge prepared by Palmer?

A Yes, they were.

Q Do you know for a fact that the line items in the May balance sheet were made up of the same categories as the June balance sheet?

A Yes, they are the same categories. Both statements were made from the same sets of records by the same people.

Q But the same kind of information would go into the accounts receivable in the May balance sheet as in the June balance sheets?

A Yes.

Q Did you participate in the negotiations leading up to the sale of Palmer to Tabet?

A Yes, I did.

Q Did anyone from Baldt work on those negotiations?

A No.

Q With whom in Tabet did you negotiate?

A Mike Tabet and Hughes Burton.

Q Before we leave the exhibits, Mr. Hollyer, on page 16 of Exhibit 1 --

A Yes.

Q Can you identify those signatures?

A Under the words Baldt Corporation my signature and title. To the left of it is Ernest Lorch, secretary of the Baldt Corporation and also our general counsel.

Q Was he representing you in this transaction?

A Yes, he was.

The signature under Tabet Manufacturing is Hughes Burton, vice-president, and Vincent Mastracco, as assistant secretary and at that time he was also representing Tabet Manufacturing as counsel.

Q In this transaction?

A In this transaction.

Q Mr. Hollyer, who first contacted whom about the sale of Palmer to Tabet?

A Shortly after I joined Baldt Corporation in April of 1970 a letter came in from Tabet Manufacturing and in it

Tabet evidenced interest in the purchase of Palmer.

I remember it quite well because it was one of the first assignments I was given by the president of the corporation and I followed up on it by calling Tabet Manufacturing -- I don't recall whether I talked to Hughes or Mike Tabet and arranged to go down there shortly after that and met them to discuss it.

Q Can you briefly outline the negotiations leading up to the sale?

A The negotiations took place over a long period and with some substantial intervals in-between.

Between the summer of 1970 and July of 1971 I made several trips to Tabet Manufacturing in Norfolk. We held some telephone conversations and also Mr. Burton and Mr. Tabet came to New York once and also were up at Palmer once.

In the fall of 1970 it became readily apparent that the business of Palmer was deteriorating rapidly and this initiated a decision on our part that we should proceed with the sale whether to Tabet or to some other interested party.

Q What did you pay for Palmer?

A Just slightly over $2,000,000 in cash.

Q In 1969?

A In 1969.

Q You said the business had deteriorated?

A It was losing money steadily and my analysis was that the prognosis was not good so we decided as a corporate decision in the fall of 1970 that we would dispose of Palmer.

When I first talked with the people at Tabet, obviously I was interested in getting our book value out of it, namely, $2,000,000. They were not at all interested in it at $2,000,000.

During the fall we discussed a couple of times tentative numbers in the four million bracket but they were highly tentative. In part they were highly tentative because I was talking with some other companies to see if I could get a feel of what the business might be worth.

At the end of 1970 Baidt Corporation decided that we would segregate Palmer as a business awaiting dispostion, that we would take a write down on our books of its value and we wrote the value down to a value of $600,000 which put us at a substantial loss in our 1970 operations but we felt we should do it and we put the value at $600,000 which we considered to be the minimal disposal value.

Q That is the least you would take for it?

A That is the least that it ought to be worth to anybody.

Then early in 1971, particularly after that $600,000

figure became public knowledge, which of course it did when we announced it, then I proceeded to discuss with Hughes Burton and Mike Tabet what we could realistically do within that range.

There were several phone calls and minor trips but the real, definitive negotiating took place on July 1st when I went down to Norfolk because we all agreed by telephone that if we were going to do something we should do it right then before we got in the vacation period and before the business worsened any more.

Q What happened on July 1st?

A I went down to Norfolk and I met with Hughes Burton and Mike Tabet. We reviewed the financial situation at Palmer meaning I had the operating results as of the end of May and discussed how they could buy the business and Baldt could windup with its $600,000.

Q You said the operating results at the end of May. Did you refer to the balance sheet, Exhibit 3?

A I had the balance sheet which does show the operating loss for the year on it but I also had the statement of earnings, the profit and loss figures for the months up to the end of May and some other information about what the orders were and the contracts we had.

Q Did you reach agreement on July 1st?

A Yes, we did and the agreement was on the basis that the $600,000 which was the amount that basically I had to recover on the sale of Palmer would be achieved by the $170,000 which I felt I could realistically get out of the buildings and real estate which Tabet Manufacturing did not need.

I started negotiating with $150,000 in mind based on an appraisal but after we talked for a while something had to give and they came up from their numbers and I came down from mine. I put it on the basis that the corporation would realize $175,000 from the real estate and they would pay to Baldt $425,000, $300,000 in cash and $125,000 being eight notes.

Q If Tabet was not purchasing the land and building, Mr. Hollyer, what exactly is they were buying when you say they were buying Palmer?

A All right. When we first began to talk, and I go back to 1970, it was a little bit unclear as to who would be buying what. But very quickly what it did evolve to was their initial interest was in the inventory which at that time was something in excess of $1,000,000 and the tooling to make a number of products similar to what they were making but not identical; tools for stamping metal products, plastic parts, that type of thing, and the good will of the

company in that it had a lot of approvals of military products, the Navy which was a big customer and these approvals take a long time to get.

So if they bought Palmer and bought the inventory and tools and these approvals, they had the major portion of what they wanted.

From Baldt's side here was a business up in Massachusetts which was losing money, which we had decided to sell and on which we were carrying a $600,000 asset. It would have been totally impractical from our standpoint to sell pieces of it, let us take the inventory of just tools, because we would then have wound up with open contracts to fulfill and with bits and pieces of machinery and equipment, that just would have been financially, if I might use the word, a disaster and we would have spent a couple of hundred thousand dollars finishing that off.

So it was felt it was better for me to come down somewhat on the price and have them take the whole operating company except for a few things that we did agree to keep.

Now, the things we agreed to keep were things that were not directly involved in the operating of the company or the filling of orders. For example, there was a pension program up there which was tied in to the purchase and sales agreement when we bought the company. We agreed to keep

that as a Baldt corporate obligation and not attempt to pass it on.

We, of course, agreed to keep the real estate, the land and buildings. We did allow rent-free use for 120 days and said if they needed longer than that, they could have it.

We agreed to keep certain insurance payment requirements and certain prepaid insurance balances because they were tied in with our corporate insurance program and really could not be transferred to another person. Those are the principal things. There were some smaller.

Q At that time was it the intent to continue the business of Palmer or put Palmer out of business?

A Well, it was their intention to continue the manufacture and sale of products to customers and to keep the approvals alive which it could use and have the Palmer name but they did not plan to continue operating in Massachusetts for a long period of time since they already had a factory in Virginia which was really a better factory than the one in Massachusetts.

Q In other words they were going to bring the operation down to Tabet in Virginia?

A Right.

Q Have you completed your description of the agreement reached on July 1st?

A No. We had a couple of other questions that came up after we arrived at the price.

Mike Tabet felt they wanted to have in the agreement a protection because he was concerned that a couple of things might happen. He was concerned that the cash that came into the business through the collection of accounts receivable could be siphoned off and not used to reduce the debts of the corporation. That was a valid consideration.

He also wanted to be sure that no foolish buying of things like expensive metal closures and electrical products would take place. He would have his protection on that.

He also wanted to be sure that all the accounts receivable stayed in that operating unit. These were all valid considerations and so we agreed that the balance that he asked for, he asked for it specifically was we would guarantee that the accounts receivable and the cash would not be less than the total amount of the accounts payable.

Q You agreed to this at the July 1st meeting?

A Yes, I agreed.

Q When you speak of cash and accounts receivable and payable, did you have reference to the financial statement?

A This balance sheet is the one that we had been talking about throughout the day so it was in reference

to that and, as a matter of fact, that particular calculation that day would have given Tabet about $27,000 extra guarantee but --

Q Did you talk about that?

A We talked about that. I wasn't particularly concerned about this because the business had been losing some $20,000 a month and I figured by the end of June they would lose another twenty so it would come pretty close.

Q In fact that is revealed on the balance sheet which I believe is Exhibit 3.

A The loss fact?

Q Yes.

A Yes, it shows returned earnings for the current year is a loss of $18,000.

Q You recall discussing July 1 by this formula which you say Mr. Tabet wished to have that there would be an excess at May 31 of $27,000?

A That is right. However, this was a deteriorating business. I felt we would probably come out closer to even by the end of June.

Q You were not going to use the May figures?

A No, we were going to use the May figures for the corporation in the purchase and sales agreement because they were the only figures any of us had.

But the fact that it loked as if there was a $27,000 excess to their favor did not particularly worry any of us because of the fact the business was losing money.

Q Did you also discuss at that time, Mr.Hollyer, that if under current liabilities you took accounts payable and add them to the salaries, wages and other compensation and payroll taxes and payroll withholdings, that you would come out about even with cash and receivables?

A No, that relationship while it probably mathematically is true didn't come to my attention until Burton brought it to my attention I believe in August after the closing.

Q So you are clear that at this meeting on July 1 you and Mr. Tabet talked about the accounts payable as shown on Exhibit 3?

A That is correct. Because any other way that would have meant that I would have gotten on the plane that night without having negotiated my full $600,000 worth and that I knew, that I was sure of.

Q What happened after July 1?

A After July 1 I came back to New York. The next morning I talked to Hughes Burton on the phone, reviewed the agreement that we had made. I had just prior to that talked with Ernie Lorch who was our general counsel about whether or not we could do a purchase and sales agreement

quickly and he said we could.

Q Why did you want to do it quickly?

A The main reason was that Hughes Burton wanted to get possession of the business at the earliest possible moment because he was concerned that if some of the employees up there learned of this before they came under his direct control, that they might remove drawings from the files or create some other mischief and he wanted to get his, I guess his hands on it very quickly.

Also, it was a deteriorating business. The sooner he got his hands on it the sooner he could get to work on it.

We, of course, took the position that we couldn't have anybody up there unless we had a firm, signed agreement so when I talked with Hughes on the phone the morning after I came back, we agreed that we would meet in New York the following Tuesday to review the purchase and sales agreement and all the other documentation, hoping to achieve a closing by Wednesday and we would not bother with any preliminary agreement at all, go direct to closing.

Q Up to this time, Mr. Hollyer, had Mr. Tabet or Mr. Burton asked you for any financial information about Palmer?

A They asked specific questions many times. However, I answered all of them.

Q Did they ask you for any written financial information?

A Well, they wanted a copy of the balance sheets and statements of earnings which I gave them.

Q That again you have reference to Exhibit 3 which you gave them?

A This principally, yes. We had an earlier one too, the ones from the prior year. We furnished, as far as I know, we furnished everything they asked for.

Q Did they ask for an opportunity to inspect the books and records of Palmer?

A No.

Q What happened after your telephone conversation with Mr. Burton July 2nd?

A I talked with Mr. Lorch again and he proceeded to draw up the documents.

The next event was the following Tuesday when Hughes Burton and Vince Mastracco met with Ernie Lorch, myself at the Olwine, Connelly office to finalize our agreement on all the pieces of paper, these exhibits and the notes and everything.

Q You mean Exhibits 1, 2 and 3?

A 1 and 2, finalize on those particularly and also the notes.

And we met for several hours, I would say from maybe 10:00 or 11:00 in the morning until shortly past lunch and reviewed the documents. There were certain changes which were asked for on both sides and they were incorporated.

Q Were there changes requested by Mr. Mastracco or Mr. Burton and were they made?

A There was one in the notes that I remember. The last two would not be discountable. That was put in. There was also an exclusion on the insurance requirement, small things basically.

Q In other words there were changes they requested which were made?

A Yes.

Q Mr. Hollyer, I would like to refer you to Exhibit 1, page 4.

A Yes.

Q Again paragraph 2.3 of the contract but it continues onto page 4. I would like to refer you to the sentence about the middle of the page on page 4 which says:

"In the event that the cash in accounts receivable of Palmer Electric Company do not equal or exceed the accounts payable of Palmer as of June 30, 1971, then the difference between the accounts payable of Palmer and the cash in accounts receivable of Palmer at such date shall be deducted

from the princial amount due under the notes in inverse order of their maturity."

Is that the clause which embodies the discussion you just described for us?

A Yes, the guarantee.

Q That Mr. Tabet wanted to have?

A Yes.

Q Was there any discussion on June 6 about that clause?

A Yes, we talked about the clause --

THE COURT: June 6?

MRS. KAYE: I am sorry, July 6.

A Yes, because it was important.

Q Was it in the draft agreement which you say --

A Yes, it was in the draft agreement and I do not even believe it was changed from the final agreement.

Q Do you know whether or not it was changed?

A I don't think it was.

Q What was the discussion that day, sir?

A Well, it took place within the context of really starting at the beginning of the agreement and going through every page together and we talked about this one in that it was the guarantee and to be sure we all understood the same thing and went on to other items.

Q Was there any reason for the capital letter in quotes?

A Yes. Both Mr. Lorch and I in all agreements whether this one or any other whenever we get involved in quoting specific line items from a statement, we always do the capitalizing and quotes in order to avoid any questions of what someone means later.

Q Were you referring to a specific line item when you used the word cash?

A Yes.

Q What line item was it?

A The same cash line item as shown in Exhibit 3.

Q Were you referring to a line item when you used accounts receivable with capital letters in quotes?

A Yes.

Q To what were you referring?

A We were referring to the accounts receivable item on the statement of consolidated financial condition.

Q That is Exhibit 3?

A That is correct.

Q When you used the words accounts payable in the agreement with capital letters and in quotes, to what were you referring?

A The accounts payable line item on the second page

ards

of our regular statement of financial condition.

Q Was this fact discussed that you were referring to line items?

A Yes.

Q Discussed at the July 6 meeting?

A Yes it was.

MRS. KAYE. I would like to mark for identification a draft of the agreement of July 1971.

MR. COLEY: No objection.

THE COURT: That is the draft of Exhibit 1?

MRS. KAYE: Yes, it is.

xx [Plaintiff's Exhibit 5 received in Evidence]

Q Mr. Hollyer, can you identify Exhibit 5?

A Yes. Exhibit 5 is a copy, my personal copy, of the draft which was reviewed on July 6.

Q I would like to refer you to page 4, Mr. Hollyer, middle of the page.

A Yes.

Q Was there in fact any change from the draft to the final agreement in the clause we are discussing?

A No, I show no change here.

Q What is that squiggel off to the left of the document, what does it indicate to you?

A That is the kind of mark that I make when I go

through a document, if I want to mark a place that I want to be sure that we cover it. There are a few other squiggels that appear just like that so that is to be sure to emphasize something in the discussion.

Q How were matters left on July 6 with Mr. Burton and Mr. Mastracco?

A The matters on July 6 were left that we would do two different sets of things, that Mr. Burton and Mr. Mastracco would go back to Norfolk to get their necessary corporate resolutions in order and obtain a cashier's check for $300,000.

That Mr. Lorch would have the documents retyped incorporating the agreed upon changes and that we would intend gether again at the Olwine, Connelly office later in the day on the 7th with the idea that we would stay at it as long as we had to to have a closing that evening.

Q What happened on the 7th?

A On the 7th Mr. Mastracco and Mr. Burton came back to New York, there was lots of typing and we had an early dinner. Mr. Lorch stayed and worked on the documents and Mr. Mastracco and Mr.Burton and I had dinner.

Then we went over to the Olwine, Connelly office early in the evening and, at that point, all of the agreement documents, assumption of liability and purchase and sales

was all spread out on the conference table and we began to review them, Mr. Mastracco going through each one and Mr. Burton participating with him from time to time and I took a look at the same situation with Ernie Lorch.

At one point when we had got down to the balance sheet, the fact that we were lining out the extraneous material on the right-hand side and initialing it, I don't recall whether it was Mastracco or Burton asked about a line item and I don't recall which one it was, but at that point I sat down with him and went through what was on each of the line items in the balance sheet.

Q Are you referring to Exhibit 3 and you went down line by line?

A Yes.

Q Did you explain to them what was in the item called cash?

A Yes.

Q Do you recall what you told them, both Mr.Mastracco and Mr. Burton?

A Yes. The cash is the checkbook balances. I believe three different bank accounts were in Boston.

Q What did you tell them was the meaning of accounts receivable?

A That was the total of all the accounts that

customers had with the company less a small amount reserve for possible bad debts.

Q What did you tell them of the meaning of accounts payable on Exhibit 3?

A Accounts payable was what we owed to people for material and services that had been procured at Palmer.

Q How did you know that, Mr. Hollyer?

A I spent a lot of time at Palmer in 1970 and 1971. It was a problem spot for which I was responsible, working on the solution, and I got a list of accounts payable items as part of our normal keeping track of what they were doing.

I wanted to be sure they weren't buying things they shouldn't be buying and, in addition to that, to set forth really what our cash flow requirement is going to be.

Q You told them the accounts payable was goods and services?

A Materials, goods, services.

Q What did you say to them was this line item called salaries, wages and other compensation?

A That we had an accrual account, we had in there the accrued wages, salaries to the hourly people which, of course, varies because of what day of the week we cut it off at the end of the month. It had a variation with accruals in it. We talked about the payroll taxes and

payroll withholding.

Q That is the next line item?

A Yes, the normal arithmatical computation made in accordance with the Federal tables. We got into all of these items because, for example, taxes other than income taxes was one of the items that we kept because there was a Massachusetts franchise tax up there that Baldt had to pay because we were the corporate entity and we talked about accrued expenses.

THE COURT: You kept that, it was not assumed?

THE WITNESS: That was not assumed, that is correct.

THE COURT: I was wondering though, you have on May 31, you have payroll taxes, payroll withholdings which are almost tripled by June 30.

THE WITNESS: Well, we investigated that pretty thoroughly, your Honor. What it amounts to is that this is a small business, we don't pay all of those monthly and it works out that there is a build-up, particularly in the withholding tax portion which is a high percentage, in other words, a normal fluctuation.

One of the exhibits that we turned over to Tabet in the deposition was the computations of those amounts from the proper records.

MRS. KAYE: I would like to offer a document,

statement of consolidated fina al condition, June 30, 1970 of Palmer Electric.

MR. COLEY: I have no objection.

THE COURT: Received.

xx [Plaintiff's Exhibit 6 received in Evidence]

Q Mr. Hollyer, is Exhibit 6 the document to which you have just made reference where the items of payroll taxes and payroll withholdings are broken down?

A Well, it is broken down on these in terms of what was retained by Baldt and what things were kept by Palmer and what went to Tabet, yes.

Q When was the June 30, 1971 financial statement of Palmer prepared?

A In the middle of July.

THE COURT: That is Exhibit 6?

THE WITNESS: Yes, sir.

Q So that at the time the agreement was signed you did not have that financial statement?

A No.

Q Did you yourself have the results?

A No, I did not.

Q Of the operation?

A No, it takes longer than that to close the books and come up with even a preliminary set of numbers.

Q At the time the agreement was signed did you not know what the amounts were for accounts payable on June 30, 1971?

A No, I did not.

Q After you and Mr. Burton and Mr. Mastracco reviewed line by line the balance sheet which is Exhibit No.3, was it then that the initials were placed on it?

A Yes.

Q Then what happened?

A Then we completed the closing, the signing of the remainder of the documents, transfer of the checks and we all adjourned and went to bed, it being about midnight at that point.

Q Mr. Hollyer, I would like to refer you again to the agreement which is marked as Exhibit 1.

A Yes.

Q The paragraph 9.5 which is on page 14.

A Yes.

Q About in the middle of that paragraph it says:

"In addition neither seller nor the company will make or have made any representations, covenants or guarantees about the business assets and liabilities being acquired by the company hereunder except as to the extent specified contained herein and this company hereby represents and

warrants it is fully aware of the business condition and operations including financial condition of Palmer." Was that discussed at the July 7 meeting?

A Yes, it was. It was discussed first at the July 6 meeting but we did discuss it in going through the items because, number one, it is a normal part of a transaction, and as I recall, provided no problem to either side.

It also came up in connection with the fact there was not time to comply fully with the question of the Bulk Sales Act in Massachusetts and I remember we talked about this within this context.

Q Did you talk about the representations that the company that mentions Tabot in this agreement represents and warrants it is fully aware of the business conditions and operations of Palmer?

A Yes. One of the reasons I remember something about that is that they said it a number of times in the negotiations because Palmer was a competitor, and they knew more about that business than I did. I must confess they were probably correct in some respects.

Q The first sentence in the paragraph 9.5 reads: "This agreement is the entire agreement between the parties." Was that also a subject of discussion?

A I really can't recall whether we segregated this

one sentence actually.

Q Do you remember on July 7 going through this agreement?

A Yes.

Q Do you remember also Mr. Burton going through the agreement before it was signed?

A Yes. He and Mr. Mastracco went through each one of the documents the night of the closing.

Q Up to the time of the closing, Mr. Hollyer, did Tabet, the company, request any additional financial information from you?

A No.

Q About Palmer?

A No.

Q Did they ask any questions of you that you left unanswered?

A I don't believe so. They asked a lot of questions but I think I found the answers to what they were looking for.

Q I would like to refer back to the June 30 balance sheet. We now have two of those marked in evidence.

A Yes.

Q One of those I believe is appended to the letter from Mr. Benedict dated July 22, 1971 which was marked as Exhibit 4 and the second one has been marked as Exhibit 6.

Why are there two documents, Mr. Hollyer?

A There are two documents -- first of all the one attached to Exhibit 4, the letter, is a copy of the document as it is normally prepared by our accounting people.

THE COURT: Just rounded out?

THE WITNESS: Yes, we do it to full thousand dollars.

A The one marked Exhibit 6 was not prepared at Palmer, it was prepared in New York City and was prepared for the purposes of specifically segregating items down to the last penny so that the accounting personnel in both companies could make the acutal entries rather than just deal with these rounded thousands.

Q Looking at the financial statement, Exhibit 4, did the cash and receivables of June 30 in fact exceed the payables?

A There was a very close balance, I think within a thousand dollars.

Q Was there any right to a setoff then by Tabet?

A No.

Q Has Tabet paid the full contract price?

A No, they paid the first five of the notes although the latter ones were paid late and after considerable expediting by telephone to obtain payment. The last three

were repudiated, they were not paid on time.

MRS. KAYE: Before you go further I would like to mark as the next exhibit the Tabet Manufacturing Company senior note due November 15, 1972.

MR. COLEY: No objection

THE COURT: Received.

xx [Plaintiff's Exhibit 7 received in Evidence]

Q Mr. Hollyer, is this the sixth note you just referred to?

A Yes.

Q I notice that page 1 of the note is stamped Chemical Bank paid November 15, 1972. Was this note paid by Tabet?

A No. The reason for that stamp which actually is an error by the Chemical Bank, was because this note and the prior one had been discounted at the Chemical Bank and the little slip of paper that constitutes the rest of the exhibit --

Q The front?

A The little piece on the front is where Chemical charged us the $15,625 and then marked it paid because in their eyes it was although the original document had not been.

MRS. KAYE: I would like to mark as the next exhibit the Tabet Manufacturing senior note due February 15, 1973.

MR. COLEY: No objection.

THE COURT: Received.

xx [Plaintiff's Exhibit 8 received in Evidence]

Q Can you identify Exhibit 8, Mr. Hollyer?

A Yes. Exhibit 8 is one of the series of notes, the one due February 15, 1973.

Q Was that paid by Tabet?

A No, it was not.

Q I note on page 2 of this exhibit the sentence "This note is nonnegotiable and subject to setoff as provided for in said agreement."

A Yes.

Q I do not see the same sentence in the preceding exhibit.

A The reason for that, one of the things that Mr. Mastracco asked for in this meeting where we were reviewing the draft was that the last two notes, those which would be involved in a setoff, not be assignable or discountable so if there were setoffs there would be no third party such as a bank involved and we incorporated that provision and that is why you see it there.

Q In other words it was only the last two notes that were subject to a setoff if that was appropriate?

A Yes.

MRS. KAYE: I would like to mark as the next exhibit the Tabet Manufacturing Company senior note due May 15, 1973.

MR. COLEY: No objection.

THE COURT: Received.

xx [Plaintiff's Exhibit 9 received in Evidence]

Q What is Exhibit 9, Mr. Hollyer?

A This is the last of the notes due on May 15, 1973. It was not paid.

Q Have you asked Tabet for payment of the last three notes?

A Yes. We asked for payment on them. We asked our attorneys to write to them and demand payment.

We received a check from their attorney, a Tabet check from their attorney, for $5,000-something marked "Payment in full" which, of course, we could not accept and did not cash.

Q How much do they owe you, sir?

A $46,700-something, three times $15,625 plus the interest.

MRS. KAYE: I would like to mark as the next two exhibits first a letter of December 11 from Mr. Lorch to Michael Tabet and second a letter of December 28 from Mr. Lorch to Michael Tabet.

MR. COLEY: No objection.

THE COURT: Received.

xx [Plaintiff's Exhibits 10 and 11 received in Evidence]

Q Are these the letters to which you referred as letters that were written by your attorneys?

A Yes, those are the letters.

Q After those letters and since the letters have you received any payment from Tabet?

A No.

Q Mr. Hollyer, I wonder if we might refer back to the May 31 balance sheet and compare it to the June 30, 1971 balance sheet in the three items which we are here today to talk about, which is cash, accounts receivable and accounts payable and I wonder if you can tell me as to each of those if the difference was unusual or out of the ordinary course of business?

A All right. I will just touch on the principal ones.

The cash remained basically unchanged for the simple reason that was the balance that we kept up there.

The accounts receivable went from a net amount at the end of May of $103 to a net amount at the end of June of ninety-eight, which is to all intents and purposes the same number in a business of this size, very, very close.

And going to the -- I don't think there is any necessity

of going into the inventories.

Q No, let's stick with the items in issue.

A The accounts payable went to one hundred seventeen at the end of June as opposed to ninety-eight thousand at the end of May. Now, that is not unusual in this type of business for several reasons.

Palmer made products in groups. They would make a dozen of something and twenty-six of another product and their input of materials and their shipments followed a somewhat irregular pattern and they would get a lot of materials in for a job, principally these big brass boxes and electrical components that would push the payables up and after they built the products there would be a corresponding large amount passing through the accounts receivable. So the variations of this type are quite normal.

Do you want to go on to the next item, taxes?

Q Salaries, wages and other compensation.

A The compensation went from twenty to twenty-one which is again minimal.

Payroll taxes and payroll withholdings went up because they were due shortly after the June 30 statement. You accumulate these in those periods.

Taxes other than income taxes went up but again, this was merely the reflection of those passing through the

normal train of events and we keep those anyway.

The other accrued expenses went down $10,000. Again, the normal trend of the business.

The negative balance in the Federal income taxes increased from eighty to ninety-four as a result of the fact that we had a loss in that month.

The state income tax in Massachusetts, while they call it an income tax is really a franchise tax and it went up for another month's tax requirement to $13,000.

The current portion of the long term debt stays the same for the next twelve payments and that is the mortgage on the building and we kept it.

The current liability column switches from one hundred thirty-five to one hundred forty-four for a net of $9,000 which is not inconsistent in a business of this size.

Q Mr. Hollyer, referring back to Exhibit 1, which is the basic agreement here, does the word accounts payable appear anywhere else in this agreement other than in the one place we have been discussing this morning?

A I am looking because this goes back a year. No, we don't show it anywhere else.

Q Now go to the words Palmer liabilities, 2.3. Was there any particular discussion about what the Palmer liabilities meant?

A Well, there was quite a lot of discussion because we worked quite hard to write paragraph 2.2 which deals with the carving out of the liabilities which we had agreed to retain, so there was a lot of discussion about what these were and that is one of the sections also which was changed between the draft and the final document as we worked out the definition of liabilities.

Q What were the Plamer liabilities as they were agreed to?

A They agreed to accept the Palmer liabilities except for the ones that we said we would keep in the previous section.

Q What were those?

A Well, going back to the balance sheet for a moment, we said that, again sticking within the context of this, we said that we would keep the Federal, state and local taxes, the intercompany account which is down at the bottom, pension and profit sharing and health insurance, we kept that.

In terms of what they accepted and took would be the accounts payable of salaries, wages and other compensation, payroll taxes and payroll withholdings. That is basically it except for a few of the accrued expenses, the bulk of the accrued expenses we retained.

Q They assumed --

A The remainder is apparently what is in the balance sheet.

Q I notice, Mr. Hollyer, in the assumption of liability agreement, Exhibit 2, at the top of page 3, Tabet was assuming obligations including obligations to Palmer employees. Was there any particular discussion about this?

A Well, yes, because we had at that time of the closing some fifty-seven or fifty-eight employees up there who were on the payroll and who would have to be paid and who had their vacation time coming -- this was the first week in July and vacations came up there normally and were taken I believe in the latter part of July.

Q Did you specifically recall having talked about this?

A Yes.

Q With whom?

A We talked about it with Mr. Mastracco and Mr. Burton in our meeting when we worked out the wording, the relationship between this paragraph here and the one that I referred to a moment ago, that paragraph 2.2 in the other agreement.

Q Do you also recall pointing out to Mr. Burton and Mr. Mastracco that accrued vacation was contained within the line item salaries, wages and other compensation, which

was on Exhibit 3?

A Yes, because one of the questions that naturally came up, and the way we got this phrase is what other kinds of compensation were there. The big other compensation is vacations.

MRS. KAYE: I have no further questions as this time.

THE COURT: We will take a short recess.

[Recess]

MR. COLEY: Your Honor, if I may, I would like to introduce in evidence the affidavit of Mr. Hollyer that was originally filed in the Supreme Court, State of New York in lieu of a complaint and after the case was removed it was subsequently the pleading in this proceeding.

It is my understanding that that is probably a pleading and it is already in evidence.

THE COURT: I think so. The more I think about it, I think any decision here will have to be a decision on a motion for summary judgment. We have taken exhibits form both sides and both sides have an opportunity to examine witnesses as I understand it the only way this matter is presently before the Court is by way of a summary motion made in the Supreme Court and removed to this court.

MR. COLEY: That is correct, I believe that is the

proceeding.

THE COURT: As I understand it there is authority for that proposition and I am only concerned about what happens in the Clerk's office when they don't find a complaint and an answer. The disposition of the matter would be more difficult in the Clerk's office than it would be here. You can run into all sorts of problems to get a judgment entered.

So I think that is the way we will have to proceed and so obviously Mr. Hollyer's affidavit as part of the papers that were removed from the State Court, are part of the record.

MR. COLEY: Fine.

THE COURT: If you want to mark it separately as an exhibit that is all right with me.

MR. COLEY: Why don't we do that just to keep the record clear.

THE COURT: Mark it as Defendant's Exhibit A.

MRS. KAYE: Your Honor, my understanding is that in the State Supreme Court an application had been made and the motion denied and that under the civil practice law that motion would have been treated as a complaint.

THE COURT: But we have no such arrangement here and there is authority for removing that type of proceeding in the State Court to the Federal Court but we have no

independent provision for bringing on a motion for summary judgment in the Federal Court without there being some underlying papers.

MRS. KAYE: I am just a little confused about if you find an issue of material facts do we lose --

THE COURT: I am trying just this. All I am saying is that in form a motion for summary judgment was made in the Supreme Court and removed to this court and presents no problem. In this court there is jurisdiction. The motion was previously denied because there was a triable issue of fact. Those issues, it is tried on that basis and the judgment will be entered.

MRS. KAYE: Thank you, your Honor.

xx [Defendant's Exhibit A received in Evidence]

CROSS-EXAMINATION

BY MR. COLEY:

Q Mr. Hollyer, I show you Defendant's Exhibit A. Is that your affidavit?

A It appears to be, Mr. Coley. I can't make a complete verification. It looks like it.

Q It is your signature that appears on the last page, page 7, is that correct?

A That is correct.

Q I would like you to refer to Exhibit E of that

affidavit, Mr. Hollyer.

A Exhibit E?

Q Yes. I believe that that is the balance sheet of Palmer dated May 31, 1971 a copy of which or an original of which has previously been marked as Plaintiff's Exhibit 3.

A That is correct.

Q I would like to refer you to the liabilities section of that exhibit.

A Yes.

Q You will notice in the corner, the upper right-hand side there appears to be initials. Do you know whose initials they are?

A Those are my initials and Hughes Burton's initials.

Q If you look over on the left-hand side of that page, next to the line item accounts payable, salaries, wages and other compensation, payroll taxes and payroll withholdings --

A Yes.

Q You see three check marks, is that correct?

A It appears to be, yes.

Q Below that there appears to be some numbers, a 6, a 3 and possibly -- I can't make out the first two, a zero and maybe an 857 and a decimal point, is that correct.

A On the copy I have, looking at it it is legible.

There is something apparently there but I can't tell you what it is.

Q I have reference to page 3.

A Right.

Q And I refer to the liabilities page of that exhibit on the left-hand column.

A Yes.

Q Do you see the check marks or any writing?

A I see nothing to the left of the printed form.

Q This particular Exhibit E, I take it it originated from your counsel's office?

A I am not sure where or what copy they photocopied.

Q Are there more than one of these that were initialed by you?

A Yes, there were several copies that we initialed.

Q If you look at Plaintiff's Exhibit 3, in the upper right-hand corner under the bottom initials there appears to be a line, is that correct?

A Yes, a mark of some type there.

Q If you look back on Exhibit E of your affidavit, there doesn't appear to be such a line, is that correct?

A Yes.

THE COURT: Under the initials?

MR. COLEY: Yes, your Honor.

THE COURT: I don't see any line. I don't see any line on this.

MR. COLEY: That is the original. Here is the line.

THE COURT: This is a different copy.

Q So it would appear these are two different documents?

A Do you mean different copies of different documents? I am not sure I understand what you mean.

Q There are abviously Exhibit E as attached to your affidavit?

A Yes.

Q It has three check marks on the side?

A Right.

Q And not a line underneath the initials?

A Yes.

Q We don't have the original of that document but it would appear that the Plaintiff's Exhibit 3, which we do have an original of is not the original of the Exhibit 3, is that correct?

A No, there is one set of original documents.

Q I understand that.

THE COURT: But they were all the same. We are talking about one document which apparently had some check marks and which apparently had some figures and that was

a photostatic copy of that particular one and is part of Exhibit E to the affidavit of Mr. Hollyer contained in the motion for summary judgment.

Q Would I be safe in assuming that Exhibit 3 is not a Xerox copy of Plaintiff's Exhibit 3?

MRS. KAYE: I object to that, your Honor. I don't think Exhibit 3 is a Xerox or a copy of anything.

MR. COLEY: I didn't say that. I said Exhibit 3 is obviously a Xerox copy of a document.

THE COURT: Yes.

MRS. KAYE: Exhibit 3 is the original.

MR. COLEY: Exhibit E is a Xerox copy attached to his affidavit.

MRS. KAYE: That is correct.

MR. COLEY: Exhibit 4, is that an original? I am asking this witness if Exhibit E to his affidavit is a Xerox copy of Plaintiff's Exhibit 3 which is an original.

A I would have to answer you that I do not specifically know who Xeroxed that copy or which of the pieces of paper he used as the original when he did it. I don't know.

Q Do you know where the original of Exhibit E to your affidavit might be?

A I don't really know whether any of the copies of the material attached to the affidavit ever had one of the

originals, meaning originals from the closing.
Q There obviously is a difference on the face of the two documents because one has check marks and the other one doesn't and one is a Xerox copy and the other is an original.
Do you know where the original of this copy is?
A No, I do not know.
Q Exhibit E to your affidavit?
A No.
Q Mr. Hollyer, do you know the origin of the check marks on Exhibit E to your affidavit?
A No.
Q Have you ever seen the original of that with the check marks on it?
A No -- let me say this. I may have seen it. I don't recall ever noticing there were things up in the corner.
Q I believe you testified that the agreement that was reached between you and Tabet was embodied in a purchase of assets agreement which is Plaintiff's Exhibit 1 and an assumption of liabilities agreement, Plaintiff's Exhibit 2, and certain exhibits and notes that were drawn up in connection with those two documents, is that correct?
A Yes.
THE COURT: The promissory notes?

MR. COLEY: Yes.

Q Isn't it true, sir, that Tabet never had any intention of running the Palmer division of Baldt as an operating entity in Massachusetts as you were operating it?

THE COURT: I think he already testified to that. I don't know how he can testify to what their intention was unless they told him. They didn't intend to.

THE WITNESS: They said that they did not intend to continue the operation up in the Boston area indefinitely.

That had to come out because we offered free use of the building for 120 days.

Q Did Mr. Burton tell you that he intended to remove the equipment from that building and bring it to Norfolk?

A Yes.

Q Did he advise you as to whether he intended to bring any of the employees of that division down to Norfolk?

A He said that he thought he could use very few but in the final analysis he had competent employees in Norfolk to do the bulk of the work.

Q Isn't it true that it was at your request that Tabet finally agreed to assume some of the liabilities of the Palmer division?

A It was my negotiating posture that we were only interested in selling basically the whole business except

for the small things that we could keep ourselves, yes.

Q Correspondingly, it was Mr. Burton's position that he only wanted to buy the assets of the company, is that correct?

A Initially he was only interested in some of the assets, that is correct.

Q But at some point he agreed on behalf of Tabet to assume some of the liabilities?

A And to get most of the assets, yes.

Q I would like to refer you, sir, to Plaintiff's Exhibit 4 which is the June 30,1971 financial statement.

A Yes.

Q I notice that the liabilities and stockholders' equities section of the balance sheet, which is page 2, is broken down into four columns.

A Yes.

Q Liabilities and stockholders' equity, total sold to Tabet, retained by Baldt.

THE COURT: That is a different exhibit.

A Are we on two different exhibits, Mr. Coley?

THE COURT: I think you are talking of Exhibit 6.

Q I am sorry, Exhibit 6, you are correct.

THE COURT: All right.

Q There are four columns there?

A Yes.

Q The third one is sold to Tabet?

A Right.

Q Now, I notice that the liabilities sold to Tabet include the accounts payable, salaries, wages and other compensation?

A Correct.

Q Payroll taxes and payroll withholdings?

A Correct.

Q Other accrued expenses?

A Assume a portion of other accrued expenses.

Q The figure is eight thousand five hundred ninety-five point seventy-eight cents?

A Right.

Q I notice all of those liabilities come under the heading of current liabilities?

A Yes.

Q I notice under the section about halfway down the page, long term debt and long term liabilities, none of those were sold to Tabet?

A That is correct.

Q All retained by Baldt?

A That is correct. The only long term debt up there, Mr. Coley, is this $149,000 and was the balance of the

mortgage on the building which we retained.

Q So you have previously testified that you reached a figure of $425,000 in your negotiations in Norfolk with Mr. Burton and Mr. Tabet and yourself.

Did Mr. Burton convey to you the fact that they, meaning Tabet, did not want to pay a nickle more than $425,000 for the assets they were purchasing?

A He said he didn't want to pay Baldt more than $425,000.

Q He didn't say he didn't want to pay more than $425,000?

A No, because he knew that additional cash was going to have to be put into the business in addition to the $425,000 but Baldt would not get that cash.

Q Did he at that time or Mr. Tabet at that time express their understanding that with respect to the May 30, 1971 balance sheet, which is Plaintiff's Exhibit 3, that with respect to the cash and net accounts receivable in the amount of $20,000 and $103,000 taken against three other line items on the liabilities section of the balance sheet, accounts payable, salaries, wages and other compensation and payroll taxes, roughly to use the expression we use, they washout against each other and that there is in fact only about a few, if you take that equation,

$2,000 in cash over the total of accounts payable, salaries, wages and other compensation and payroll taxes?

A No. There is, as a matter of fact, if you look at that balance sheet, some of the items that are involved to arrive at that $135,000 don't even figure in.

Q $135,000?

A If you take the total current liabilities which is what I believe you say, that plus the cash and take out the local taxes, the accrued expense item of $51,000 in there, we don't even get into the question of what specific amounts were in the given ones. You would have to figure some of those in to arrive at a true balance to do it in that way.

Q I don't think you quite answered my question. You may have expanded on it.

Is it your testimony that you were not aware or Mr. Burton and Mr. Tabet did not express that equation to you in Norfolk?

A They did not express it to me including liabilities other than accounts payable.

Q In that meeting in Norfolk did you ever ask Mr. Burton and Mr. Tabet what they meant by accounts payable?

A Not as a specific question. But when we were having the discussion out of which the guarantee came it

was Mr. Tabet who said that his area of concern lay in the area as far as payables were concerned, of purchases of materials, wasn't really all that worried about services and this was all strictly accounts payable.

Q In the term accounts payable, but the term you use was probably just payables?

A Accounts payable was the term used.

Q You just mentioned payables?

A I might have used the term but we were talking in terms of he was specifically concerned about the purchase of materials and payment for those materials and it was out of that that the guarantee derived.

Q When you were testifying on direct before about this area you mentioned that Mr. Tabet was concerned principally, that is your word, about the accounts payable.

Am I led to believe that the word principally also conotes the fact he was worried about other payables?

A No, his big other worry was the fact that he distrusted Mr. John Burke who at that point was the general manager up there and was concerned that Burke would do something wrong or something along that line. He distrusted some of Mr. Burke's relationships with suppliers. I never found any basis for this distrust.

Q Did Mr. Burton or Mr. Tabet ever express to you

why they were willing to assume certain of the liabilities of the Palmer division?

A They were willing to assume some of the liabilities because we would agree to sell the business at such a low distress price unless we sold the package separating out, of course, the real estate, and pensions which we could deal with. We wouldn't entertain it any other way.

Q Isn't it true that it was a lot easier as far as bookkeeping goes for Baldt that if you were transferring the assets of the business of the Palmer division not to carry those liabilities on your books and carry them as a division of that corporation?

A No, the bookkeeping I don't worry about. We can get the bookkeeping done.

Q Wouldn't that have reflected a negative cash flow to a certain extent that would have been a net drain on Baldt if it had to pay those liabilities after it transferred the Palmer division?

A It would have meant we wouldn't have gotten the $425,000, that plus the $175,000 wouldn't have given me the $600,000 and that is one of the reasons I was sure of my understanding with them.

THE COURT: Let's have a little lunch and come back at 2:00 o'clock.

[Luncheon recess taken until 2:00 p.m.]

ards

AFTERNOON SESSION

2:00 p.m.

J A M E S H. H O L L Y E R, resumed:

MR. COLEY: I have no further cross-examination at this time.

REDIRECT EXAMINATION

BY MRS. KAYE:

Q Mr. Hollyer, I would like to draw your attention to Exhibit A, and to Exhibit E thereto of your affidavit.

A Right.

Q Is the handwriting that appears on page 2 on the left-hand side, is that your handwriting, Mr. Hollyer?

A No.

Q Do you know whose it is?

A No, I am sorry, I do not.

Q Did you assemble the exhibits which were annexed to your affidavit?

A No.

Q Who did?

A They were assembled at the Olwine, Connelly, Chase office.

Q Did you supply the exhibits to them?

A No.

Q I would like to refer you back for a moment to Exhibit 3.

A Yes.

Q Do you have any doubt, Mr. Hollyer, that is the exhibit which was initialed on July 7, 1971 at the closing?

A No, I do not.

Q Was there any handwriting on page 2 on the left-hand side at the time that was initialed?

A No.

MRS. KAYE: Thank you.

RECROSS-EXAMINATION

BY MR. COLEY:

Q Mr. Hollyer, were you aware whether or not there were more than one balance sheets of May 31, the sheets initialed?

THE COURT: I think he testified earlier there were several.

MR. COLEY: All right.

REDIRECT EXAMINATION

BY MRS. KAYE:

Q Did any of them have handwriting on them?

A No, I saw no handwriting on the documents. I am not a bear on writing on original documents so I am sure I would have noticed.

MRS. KAYE: Thank you.

THE COURT: You are excused.

[Witness excused]

MRS. KAYE: That is the plaintiff's case. I would like to move at this time for judgment in our favor based on the fact, your Honor, that there has been no ambiguity shown in the document. The contract is clear on its face in view of the integration clause and the as is clause which appears in the contract and we would ask your Honor that no evidence be admitted that would alter, vary or contradict the document on that basis and that judgment be rendered in our favor.

THE COURT: I will reserve decision on that.

MRS. KAYE: Thank you, your Honor.

THE COURT: Do you have any witnesses?

MR. COLEY: I would like to call Mr. Hughes Burton.

H U G H E S D. B U R T O N, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. COLEY:

Q Mr. Burton, by whom are you employed?

A Tabet Manufacturing Company, Inc.

Q What is your title or capacity?

A Vice-president and general manager.

Q How long have you held that position?

A For approximately five years.

Q Was that your position at the time you executed the purchase of assets and assumption of liabilities of Baldt Corporation?

A Yes, it was.

Q Did you participate in the negotiations that led to the signing of that agreement?

A I did.

Q Was your participation on behalf or as a representative of the Tabet Corporation?

A It was.

Q When did you first become seriously interested in purchasing the assets of the Palmer division of Baldt Corporation?

A It would be sometime approximately in April or May of 1971.

Q What kindled that interest?

A It was the price that the Baldt Corporation wanted for it. It had reached a level where we felt justified and we were willing to negotiate.

Q How did you see the Palmer division fitting in with your operation at Tabet?

A Tabet is an electronic and electrical manufacturing firm. At that time primarily more electronic than electrical and we were desirous of expanding our product line, bascially we were a small company and wanted to expand our product line somewhat. We were already making some of the products that the Palmer division of the Baldt Corporation made.

We thought that it would be a good acquisition for us, provide us with some additional products and broadening our base a little bit.

The purchase of the corporation or the Palmer Electric was reduced to a pretty elementary procedure in steps by Mr. Tabet our president and myself. There were only certain things that we were interested in and having never been involved in an acquistion before, we tried to maintain or to setup a value for the assets, certain assets of the company that we felt the price was justified.

The main thing we were interested in would be the tooling, the materials to make the products they sold, their inventory. Their work in process and we gave a value, set a value for these things.

Some of the information about inventory was provided us by Mr. Hollyer. We inquired about their finished inventory and were given a figure there. So we then set a price ourselves and it was within reason or relatively close to what

Mr. Hollyer stated they were looking for for the business so we began negotiations.

Q Did you at anytime ever contemplate operating the Palmer division as a separate entity?

A No, we did not.

Q You never at anytime contemplated operating Palmer in Massachusetts?

A Most definitely not.

Q Can you describe at this time how Tabet was set up? Did it have any divisions?

A It had no divisions, still doesn't have any.

Q Any subsidiaries?

A No.

Q It was one operating entity?

A Exactly.

Q The value that you were formulating in your own mind with respect to what you thought the Palmer division was worth, were you including in that any of the cash or accounts receivable or any of these so-called soft assets when you were making your decision to purchase the Palmer division?

A No, we didn't. We had no interest in those at all.

Q I take it from your testimony then that your interest was only in the machinery, the actual hardware and hard goods and the name of the company?

A That is coxrect.

Q What finally made you decide that in addition to the hardware and machines that you would also acquire the receivables and the cash of the Palmer division?

A It was simply at the request of Mr. Hollyer.

Q Why did he make that request?

A He stated at the time the request was made that it would be easier for him if those liabilities were paid or these liabilities were paid out of the Palmer division by us after we took it over, these liabilities being the accounts payable, the payroll and such things as that.

Q How would you characterize the liabilities that you just referred to in your own mind?

A Well, in this particular situation where there was an equation, a washout equation so to speak in the agreement, these accounts or items were referred to as accounts payable, these things that Tabet assumed the responsibility to pay.

On the other hand we had accepted certain assets, current assets that were to cancel these, to wash them out. So that in the end it would not cost Tabet anything to accept these liabilities. They would be washed out by the income from the receivables and cash supposedly on hand.

It would not affect the purchase price.

Q Was it the intention after you had agreed to assume some of the liabilties of Palmer at Mr. Hollyer's request that the liabilities would be satisfied out of the current or soft assets of the Palmer division, that you really had no interest in at first when you were thinking about acquiring the company?

A That is correct.

MRS. KAYE: I will interpose an obection at this point, your Honor. As I stated before, we do retain our continuing objection to this extrinsic evidence but insofar as we are going to take extrinsic evidence could it be a discussion and communication rather than a formed or unformed intention in his mind?

THE COURT: Yes, I think we will have to discuss -- the objection is well taken. These intentions or understandings weren't communicated.

MR. COLEY: I intend to show they were communicated.

THE COURT: Then you can ask him.

Q Were these intentions communicated by your to Mr. Hollyer?

A Most definitely through the course of the negotiations.

Q When were they first communicated to him?

A Well, the first request on Mr. Hollyer's part that

we accept some liabilities of the company came during the last visit to Norfolk. The last negotiations where Mr. Mastracco, our counsel and I were in the office of Olwine, Connelly and it was requested that we assume certain other liabilities and, at that time, we accepted them reluctantly but this washout was a protection for us and it was a matter of accommodating Mr. Hollyer more than anything else.

There was a payroll to be met and a matter of a few days after we took over and that had to be paid and we were going to have been up there and had control of the checkbooks and accounts of the company and it seemed logical and simple enough for us to pay so long as it didn't cost us anything.

Q Did you express to Mr. Hollyer that it was your intention that you were going to pay or going to commit only $425,000 to buy the assets of the Palmer division and no more?

A This point was expounded by myself and by Mr. Tabet and by our counsel.

Q If I could, Mr. Burton, I would like to refer you to Plaintiff's Exhibit 1 and I would like you to refer to paragraph 2.3 of that agreement; specifically that portion of paragraph 2.3 that goes over onto the following page.

A Page 4?

Q Yes.

A There is a sentence, the last sentence in that

paragraph which has already been read into the record. It begins "In the event cash" -- have you read that?

A Okay, I have it.

Q Is this the washout formula that you have been referring to?

A That is the formula, the equation that we derived, yes.

Q Do you know who actually drafted that sentence?

A The actual wording of the sentence was drafted by the Baldt attorneys.

Q It is not your wording?

A No.

Q You did not supply any of that to them?

A No.

Q When you saw this particular sentence in the agreement, did you ask anyone when you were at Olwine, Connelly what this particular sentence meant?

A Well, yes, but it was not a specific question. Mr. Hollyer asked that we accept the accounts payable and then during the course of the discussions in their attorney offices, while we were at the conference table discussing this agreement, there were certain references by their attorneys and Mr. Mastracco to other accounts that I had not heard spoke of and really no agreement, verbal agreement

between Mr. Hollyer and I and no mention of it. When these accounts, the names of these particular accounts which are line items on the balance sheet arose I asked the question why are we talking about these accounts, what are we specifically talking about?

I thought we were only talking about the trade accounts payable so to speak and that is when I raised the question and it was explained by our attorney what was included, what we were talking about and included in the agreement or the accounts payable portion of this equation.

Q So the specifics of what was included in that weren't discussed by you at anytime prior to this meeting that you had at Olwine, Connelly?

A Only one item was discussed and that was on an item on the balance sheet.

Q During the negotiations in Norfold when you were discussing the possible acquisition with Mr. Hollyer, was this May 31 balance sheet of Baldt discussed?

A It was there and it was mentioned but I wouldn't say it was discussed.

As I mentioned previously, Mr. Tabet and I were only interested in certain fixed assets of the Palmer Company and this balance sheet didn't really mean anything. We wanted the machinery that we had seen, we wanted the

inventory that Mr. Hollyer furnished us and told us was on hand. We wanted the name and that was all we were interested in and the balance sheet didn't really relate any of that to us.

Q Mr. Burton, I am going to show you Defendant's Exhibit A which is Mr. Hollyer's affidavit. I would like to refer you to Exhibit E, the second page of that exhibit which is the May 31 balance sheet and the heading is "Liabilities and Stockholders Equity."

A All right.

Q Do you see on your copy the three check marks that we were referring to this morning?

A Yes, sir, I do.

Q Do you know how those check marks got on the original of this copy?

A Yes, I do.

MRS. KAYE: I object, I don't know what you mean by original of this copy. I don't see it before us.

MR. COLEY: I would assume this came from your office.

MRS. KAYE: I am sorry, I know of no original copy.

THE COURT: I will take the evidence.

Q Do you recall how these check marks were placed on the original of that document?

A Yes, they were put there by our attorney, Mr. Mastracco.

Q At what time?

A In response to a question I mentioned previously and the explanation of this equation to me and specifically what was going to be included in it, because I heard the facts that we were going to be accepting --

THE COURT: Who did it?

THE WITNESS: Our attorney Mr. Mastracco in the conference.

Q Was whether these three items included in this equation discussed during that particular conference?

A Yes, they were discussed and quite specifically because we even got into talking about dollars and this washout really did occur, using these numbers that we got a net amount of almost zero.

Q Did anyone at that meeting raise any objection to including these three items in the formula?

A No, it was a mutually agreed upon thing.

Q Anyone question whether these were included in the formula?

A Only myself.

Q What was the response to your question?

A Well, this was when these check marks were put on

the accounts and it was explained to me by our attorney that these items were included in this equation and that --

THE COURT: Was that at the meeting?

THE WITNESS: The meeting in July, about July 1st I believe.

THE COURT: Before the document was signed?

THE WITNESS: Yes, sir.

THE COURT: I notice in the draft of July 6 there are quite a number of notations or changes. There is no change made with respect to this particular item and it seems to me it would have been a very simple matter to be a little more specific, just like there was further specification on 2.3 on another part of the contract.

This was a matter that was important to both sides and apparently Mr. Hollyer made notations on the draft alongside of it with particular reference to the cash, accounts receivable and accounts payable and no change was made by anybody with respect to this.

Q Mr. Burton, did you at the time you left that meeting, at the time you subsequently executed the agreement, was there any doubt in your mind there was any confusion over what the formula meant?

A No.

Q Was the formula discussed at length during any

of the negotiations?

A Very definitely. As I said, we didn't want to assume any liabilities, we had no reason to. There was no cause for us to accept them.

We had agreed upon a price in Norfolk with Mr. Hollyer and this didn't include any liabilities. So there was no gain for Tabet to accept these liabilities and, as I said, the only reason we accepted them was just to accommodate him and I did it, agreed to do it because of this washout equation and this equation was discussed at length because I wanted to be sure that we were protected and I did not have to pay more than $425,000. That was the instructions I was given in finalizing these negotiations.

Q At anytime did you have any feeling there was any confusion on the part of anyone in connection with those negotiations?

A Not by myself.

MRS. KAYE: Objection.

A Or Mr. Mastracco.

Q Did Mr. Hollyer at anytime tell you what he felt that equation represented?

A I think we all, at sometime during the negotiations, gave our interpretation of that equation, myself, Mr. Mastracco, Mr. Hollyer and the Baldt attorneys.

Q Do you know how many drafts of this agreement were prepared?

A There were quite a few. There were several drafts of agreements --

Q Maybe you misunderstood.

A Only one draft, revised one time and that was the final agreement.

Q Approximately how long did the meeting last during which this agreement was drafted and put into final form?

A We arrived in New York about 10:00 or 11:00 o'clock in the morning and I think we finished the revisions of the draft sometime shortly after lunch.

Q So you are talking about two, a two and a half hour period?

A Certainly no more than that.

Q Mr. Burton, there have been introduced this morning as Plaintiff's Exhibits 7, 8 and 9, three senior notes of Tabet Corporation.

Were these the notes that were included as part of the consideration to be paid by Tabet to Baldt for the Palmer division?

A The additonal $125,000 of notes to be paid, yes.

Q As we have previously established this morning, the February 1973 note and the May 1973 note has a setoff

provision.

A Right, done at the request of our attorney.

Q Why was that done?

A That was done as a protective measure for us in this equation. If it became necessary for Tabet to have to put funds into this equation to meet the liabilities, then there was some way we had to be repaid or had these funds repaid because it was in order to accommodate the washout so to speak and we really didn't want to do it because it meant we would have to put money into this equation and would not be able to get it back, so to speak, until the last two notes.

But the reason it was only two notes, which would come to a sum of $30,000, was we felt that this would be a sum certainly that we wouldn't exceed in putting up funds. It proved ultimately that it was a little bit in excess of that.

Q I want to refer again to Plaintiff's Exhibit 1, page 4, paragraph 2.3.

A Yes, I have it.

Q Again, I would like to draw your attention to the sentence that we have been discussing --

A "In the event?"

Q Right.

A Yes.

Q I would like to call your attention to the last phrase of that sentence.

There is no reference there to how many notes are going to be subject to the setoff, is there?

A No.

Q Did there come a time when you pursuant to the purchase of assets agreement received the June 30, 1971 financial statement of the Palmer division?

A Yes.

Q I take it when you received it you reviewed the line items, the assets and liabilities?

A Correct.

Q Did you notice pursuant to your formula whether there was a washout of the assets and liabilities as you understood the agreement to be?

A It was sometime much later that we received the June statement from Baldt and we had been deeply involved in the business, so to speak, and we had control of the records and checking accounts and we knew then there was not going to be a washout in our favor.

We already had to put funds into this equation so we weren't surprised and didn't give a lot of attention to that June balance sheet because we already were aware of the situation.

Q As a result of that formula did there come a time when you informed Baldt that you were taking the setoff on the notes?

A Yes, we did.

Q Pursuant to the formula that you derived you tendered what you felt to be final payment pursuant to the terms of the agreement?

A We did.

THE COURT: When did you first notify them?

THE WITNESS: I don't remember the specific date. There is a letter, I believe, that bears that date. Sometime I would imagine in early 1972, I believe. We didn't really notify them, our attorneys and accountants wrote a letter.

Q I believe the agreement also provided that you were to have use and occupancy of that building to house the Palmer division?

A Yes.

Q What was the purpose?

A We bought the materials and equipment that were in that building and we needed time to move some of them to Norfolk, to have some of them appraised and auctioned off and finally move the operation to Norfolk.

But as I recall there was some sixteen truckloads of

material, forty thousand ton trailers so it took quite an extensive loading operation to move.

Q You didn't operate the Palmer division?

A No, not at all. The manufacturing operation was terminated almost ten or fifteen minutes after we walked into the building on July 7.

Q One other question. Mr. Burton, when you saw the May 30, 1971 balance sheet, did you notice that the cash, the line items on assets and accounts receivable as against the accounts payable, wages and salaries and other compensation, I believe the other item -- just a minute -- payroll taxes and withholdings, roughly netted out against each other?

A I believe it does in several thousand dollars.

Q I take it that -- because of this netting out did you then agree that you would assume the liabilities of the Palmer division that Mr. Hollyer requested that you assume?

A Well, in actuality it netted out here but in the statement it netted out to zero but whether or not it did really is of no great consequence to us as it was an intentment to do it because it appeared to be almost zero but so long as we had that protection of that equation we probably would have done it anyway because we had agreed to pay

$425,000 for the business and we weren't willing to pay anything through paying liabilities and we didn't want them to cost us any money.

Q Was that agreement, making a reference to the June 30, 1971 financial statement, did you have them in your possession at the time you negotiated this agreement with the Baldt Corporation?

A June 30? No, we didn't. We didn't get those until much later.

MR. COLEY: I have no further questions.

CROSS-EXAMINATION

BY MRS. KAYE:

Q Mr. Burton, is Mr. Tabet the president of Tabet Corporation?

A Yes.

Q Is he still alive?

A Still active in the business.

Q Is he in Norfolk?

A Yes.

Q Is Mr. Mastracco still your counsel?

A Yes, he is.

Q Is he still alive?

A Yes, most definitely.

Q Is he in Norfolk?

A Yes.

Q In July 1971 did you employ any accountants in your business?

A Yes, we did.

Q Did they participate in this transaction?

A In the negotiations? No m'am.

MRS. KAYE: I would like to mark this as a plaintiff's exhibit.

xx [Plaintiff's Exhibit 12 marked for Identification]

MR. COLEY: No objection.

THE COURT: Received.

xx [Plaintiff's Exhibit 12 for Identification received in Evidence]

Q Mr. Burton, can you identify Plaintiff's Exhibit 12 for Identification for us?

A This is the computation made by our accounting firm in Norfolk. It was given to me and given to Mr. Mastracco.

Q But this sheet was prepared by your accountant?

A Yes, it was.

Q You have testified that you were just buying the hardware of Palmer?

A That is right.

Q You were also eliminating a competitor, weren't you?

ards Burton - cross

A That is correct.

Q Did you in fact keep any of the military qualified listings that Palmer had?

A No, we didn't keep any of them. They had to be reaccomplished.

The Government or the Navy in this case does not allow you to retain these qualifications once you close the business down and move to a new location.

Q Did you succeed to any contracts?

A Yes, we did.

Q Did you still use the Palmer name?

A Yes.

Q Was it a well established name?

A It was an old, well-known name, yes.

Q Were you aware in July 1971 that Baldt was trying to sell Palmer to others?

A Yes.

Q Did you know in the spring of 1971 that Palmer was losing money?

A We didn't know it for a fact, we assumed they were, yes.

Q Why do you say you assumed?

A Well, we were more or less involved in the same industry, the same trade channels and customers and the same

people and we had heard rumors that they were having trouble and some of their shipyards were having trouble receiving materials from them. These were all in the form of rumors and we really had no facts to base that opinion on but it was known, at least it was our opinion.

Q You knew when you looked at the May 1971 balance sheet that Palmer had lost a great deal of money and was continuing to lose money, did you not?

A Well, the statements said that but it is a very peculiar industry. It reaches very low ebbs sometimes and this is so closely tied to the shipbuilding industry and when shipbuilding is low the companies in this industry can lose money but so long as they maintain a good inventory and their name and stay in business, when these contracts are let again they can come back extremely strongly. So we really didn't -- it was of no consequence to us really.

Q Could you take a look at Exhibit 3, Mr. Burton, page 3.

A Yes.

Q You notice the size of the retained earnings? Can you read that into the record, please?

A $325,000.

Q Is there a profit?

A No.

Q A $355,000 deficit?

A I see $325,000 deficit.

Q Was that on the prior year or the current year?

A Prior years. The current year is $81,000.

Q A deficit?

A Yes.

Q Do you notice under the debts the size of the intercompany debt that Palmer owed?

A Yes.

Q What was that?

A $89,000 I believe.

Q I think, Mr. Burton, it is $2,057,000 if I might correct you.

A I am not able to follow you very well.

Q Page 2, long term debt.

A $2,057,000, I see it.

Q The assets on page 1, the total assets?

A Yes.

Q What are they, just to complete this?

A Total current assets were $834,000. Total net property land and equipment, $819,000.

Q In connection with the purchase of Palmer from Baldt, did you ask to inspect any of the books and records of Palmer?

A No, we didn't.

Q Because you felt your own knowledge of the company was adequate?

A When we had had the opportunity to visit the company we saw the equipment that they had, Mr. Hollyer provided us with some of the work they had in process and an extensive list of inventory, finished inventory and that was basically the information we used and it wasn't necessary for us to look at the books.

Q Did you read the contract before you put your name to it?

A Yes, m'am.

Q Then I take it you did notice paragraph 9.5 that there was no representation or warranties about the business of Palmer, page 14 or the agreement?

A Yes, I am sure I read it.

Q As to the notorious 2.3, which appears on page 4, I take it you did notice that clause as well?

A Yes, I did.

Q And did you notice that the words were capitalized and quoted in the sentence beginning "In the event the "Cash" and "Accounts Receivable" exceed the "Accounts Payable" --

A Yes.

Q Did you ask why those words we capitalized?

A No, we didn't.

Q I take it you also noticed that the words accounts payable appear nowhere else in this agreement?

A Yes.

Q Did you notice the reference to the May 31 balance sheet?

A In the last sentence of the paragraph.

Q Did you notice this sentence before you signed the agreement that says "Such accounts shall be maintained in a manner consistent with that employed in the preparation of the May 31, 1971 balance sheet?"

Were there any changes made in this agreement, Exhibit 1, at your request?

A Yes. Some at my request and some at the suggestion of Mr. Mastracco, our counsel.

Q Did you ever ask that a simple statement be inserted to the effect that $425,000 was the maximum you were paying?

A No, we didn't.

Q Did you ever ask your attorney to ask such a statement be inserted?

A No. We felt that it was covered in the agreement.

Q You testified as to the forty ton trucks. What did it cost to dismantle, package and move Palmer from

Massachusetts to Virginia?

A As I recall -- the exact figure I can't give you.

Q Well, a ball park figure.

A I would imagine it cost us somewhere in the neighborhood of -- including my travel and other people that had to go in -- including the legal expense or just the moving?

Q Let's take both.

A Probably put a $15,000 or $20,000 price tag on it. The trailers were $600 or $700 apiece.

Q You knew at the time that you purchased this company that you were going to move it, dismantle it and move it?

A Yes.

Q Then you knew that you would have a cost over and above the $425,000?

A Yes, but that was decided.

Q You also asked for 120 days in which to pack up and move out?

A Well, I don't believe we specifically asked for 120 days. I don't think we asked for any specific number of days.

That was the number of days that Mr. Hollyer and the attorneys offered and I believe Mr. Hollyer offered it and

we just accepted it. It seemed like a reasonable length of time and we figured we would be out by then.

Q In that time period you had expenses?

A Yes.

Q You knew at the time you signed the agreement that you would have those expenses as well, did you not?

A Yes.

Q Did you know at the time you bought the company how much Baldt paid for it?

A We had heard and I believe Mr. Hollyer told us approximately what was paid for it.

Q When you stated a value of $425,000 on the assets which you defined as tools, inventory and such, did you also place a value on the name of Palmer?

A No, we didn't.

Q Placed a value on the contracts you would succeed to?

A No.

Q Did you place a value on the elimination of a competitor?

A No.

MRS. KAYE: I have no further questions.

MR. COLEY: No redirect examination.

THE COURT: You are excused.

ards

[Witness excused]

MR. COLEY: Before we adjourn I think that as to damages counsel has reached an agreement and we would stipulate a figure to your Honor so that the only issue really would be the interpretation of the agreement.

THE COURT: I assume you want to submit some papers?

MRS. KAYE: I renew my motion for judgment, your Honor.

THE COURT: It is renewed and I will reserve until I see the papers but I have a much clearer picture now than before so all is not lost and you will want to submit the papers on this.

MRS. KAYE: How long will it take us to get the transcript?

THE COURT: Would you want three weeks to exchange and if you want to respond to the other advise me and I will be here all summer long. Get them into my chambers.

* * * *

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
James H. Hollyer	5	47	60	61
Hughes D. Burton	62	80		

EXHIBIT INDEX

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Defendant		
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BALDT CORPORATION, Plaintiff,		73 Civ. 661 (CHT)
-against-		#41628
TABET MANUFACTURING CO., INC., Defendant.		OPINION

TENNEY, J.

This action is brought by Baldt Corporation ("Baldt"), a Delaware corporation, to recover the principal and interest allegedly due and owing on several notes issued by Tabet Manufacturing Company, Inc. ("Tabet"), a Virginia corporation. On July 7, 1971, Baldt sold its Palmer Electric and Manufacturing Division ("Palmer"), located in Saugus, Massachusetts, to Tabet, thereby giving rise to the obligations which are the subject of the controversy herein. This action, originally commenced in the Supreme Court of the State of New York through service on Tabet of a summons and motion for summary judgment in lieu of complaint pursuant to Section 3213 of the New York Civil Practice Law and Rules, was removed by defendant Tabet to the District Court for the Southern District of New York on the basis of diversity of citizenship, 28 U.S.C. § 1332. The case was tried to the Court without a jury.

Facts

Baldt had acquired Palmer for approximately $2 million cash in October of 1969. Palmer is a manufacturer of shipboard electrical enclosures which are used to shield and protect electrical components from exposure to the elements at sea. Tabet and Palmer were at that time the prime competitors in this field.[1/] Tabet wrote to Baldt in April of 1970 evidencing an interest in the purchase of Palmer, and preliminary negotiations followed. These negotiations produced no immediate result.

Palmer's business had been deteriorating steadily when, in the fall of 1970, Baldt made the corporate decision to sell Palmer to any buyer. Baldt originally sought to recoup its $2 million investment, but realized that this was not possible in light of the deteriorating state of the business of Palmer and subsequently revalued the business at $600,000. This revalued figure was made public early in 1971.

The negotiations between Baldt and Tabet appear to have resumed on a serious note when Mr. James Hollyer, then Executive Vice President of Baldt, flew to Norfolk, Virginia on July 1, 1971, to meet with Mike Tabet, the President, and Hughes Burton, the Vice President and General Manager, of Tabet. Tabet was primarily interested in purchasing the machinery, equipment, and inventory of Palmer, as it had no intention of continuing the business in Massachusetts. The parties concluded a tentative

Purchase and Sales Agreement ("Agreement") on this date at a price of $425,000, with Baldt to retain the land and buildings. The Agreement specified a $300,000 cash payment, with the balance of $125,000 to be paid in eight notes of $15,625 each.

Baldt was unwilling to dispose of Palmer's assets alone. Therefore, the Agreement included a provision for the assumption by Tabet of certain liabilities of Palmer. The Agreement had been negotiated in light of the May 31, 1971 balance sheet of Palmer, but was to be based on the June 30, 1971 closing figures. The relevant portion of the Agreement which embodies these features, Paragraph 2.3, reads as follows:

> "2.3 The Palmer Assets generally described in Section 1 of this Agreement and the Palmer Liabilities generally described in Section 2 of this Agreement of Palmer and subject to the sale and assumption agreements and pursuant to the terms hereof are and will be set forth on a balance sheet of Palmer dated as at May 31, 1971, with such changes therein as shall occur subsequent to such date in the ordinary course of business, and the Seller shall sell, transfer, assign and deliver to the Company [Tabet], and the Company shall purchase, acquire and accept all of such assets as the same shall exist on the Closing Date other than the expressly excluded assets and shall assume all of such liabilities as the same shall exist on the Closing Date other than those expressly excluded liabilities. In the event that the 'Cash' and 'Accounts Receivable' of Palmer transferred to the Company do not equal or exceed the 'Accounts Payable' of Palmer as at June 30, 1971, then the difference between the 'Accounts Payable' of Palmer and the 'Cash' and 'Accounts Receivable' of Palmer as at such date shall be deducted from the principal amount due under the Notes in inverse order of their maturity. Such account shall be maintained in a manner consistent with that employed in the preparation of the May 31, 1971 balance sheet."2/

The last two notes in the eight note series were made subject to set-off as provided in the Agreement. They were also made non-negotiable so that no third-party interest would be involved in the event of a set-off.

The parties met subsequently on July 6, 1971, in New York. Present at this meeting were Mr. Vincent Mastracco, Tabet's counsel, Mr. Ernest H. Lorch, Baldt's counsel, Mr. Burton, and Mr. Hollyer. Various changes in the documents were requested and made. Paragraph 2.3 of the Agreement was discussed at length and with apparent specificity, though no change was made in the Paragraph from the draft to the final form. Various other provisions were also discussed.[3/] The meeting lasted approximately two and one-half hours. At its conclusion, the parties retired for a final review of the documents and for finalization of financing.

On July 7, the parties reconvened in New York to close the sale. Mr. Burton raised several questions concerning the various line entries on the May 31 balance sheet. Specifically, he wanted to have these entries broken down into their constituent elements so that he might know the exact composition of each. Mr. Hollyer explained these elements in some detail. The parties then reviewed and signed all documents and delivered the appropriate cash and notes. The sale was closed, as scheduled, on July 7, 1971.

The notes due on August 15, 1971, November 15, 1971,

February 15, 1972, May 15, 1972, and August 15, 1972, were paid in full as was provided in the Agreement and are not the subject of the controversy herein.[4/] Tabet, by letter dated November 15, 1972, submitted a check in the amount of $5,538.02 to Baldt. This check was purported to be in full and final payment of the notes due on November 15, 1972, February 15, 1973, and March 15, 1973.[5/] Tabet explained this action by noting a variety of payments made on behalf of Baldt and attempted to justify the set-off by citing Paragraph 2.3. Tabet's reasoning, in essence, was that these payments were properly included within the term "Accounts Payable" as used in Paragraph 2.3 and, as such, caused an excess of "Accounts Payable" over "Cash" and "Accounts Receivable", thereby giving rise to the claimed set-off. Baldt contended that the charges did not fall within the bounds of the term "Accounts Payable" as it was used in Paragraph 2.3.

In response, Baldt's counsel, Mr. Lorch, wrote to Tabet on December 11, 1972, stating that Baldt considered the purported set-off to be improper and considered the note due on November 15, 1972, to be in default. Demand was made that the default be cured within five business days and the acceleration clause in the notes was cited. Finally, it was pointed out that the note due on November 15, 1972 contained no provision for set-off, as did the final two notes. In a follow-up letter, dated December 23, 1972, Baldt's counsel noted that the default on the November 15, 1972 note had not been cured and declared the re-

maining two notes to be immediately due and owing in accordance with the terms contained in each note. Demand was made for the payment of $46,875 plus interest within five business days. No payment was received by Baldt and the instant action followed.

Issue

The sole issue before this Court is the interpretation of the term "Accounts Payable" contained in Paragraph 2.3 of the Agreement. Baldt alleges that the term refers only to the precise line entry on the Palmer balance sheets of May 31, 1971 and June 30, 1971, labeled "Accounts Payable". Tabet, on the other hand, alleges that the term refers to actual accounts payable or current liabilities assumed under the Agreement (Palmer Liabilities). Since the parties have stipulated as to damages, the determination of this issue will settle the controversy.

Baldt's Allegations

Paragraph 2.3 was drafted by Baldt and it is Baldt's allegation that the use of quotation marks and capital letters around the words "Cash", "Accounts Receivable", and "Accounts Payable" was intended expressly for emphasis, to avoid ambiguity, and to alert any person reading the Agreement that these terms refer to the specific balance sheet line entries indicated. Baldt cites the apparent concurrence of the parties that the term "Cash" refers to the specific line entry on the Palmer

balance sheet, as does the term "Accounts Receivable". Consistency, Baldt alleges, would dictate the same conclusion with regard to the term "Accounts Payable". Further evidence of this interpretation, Baldt maintains, can be seen from the final sentence in Paragraph 2.3 which reads: "Such account shall be maintained in a manner consistent with that employed in the preparation of the May 31 balance sheet."[6/] Baldt then points to the fact that the term "Accounts Payable" is not used elsewhere in any of the documents pertaining to the transaction.

Baldt states that, from the first, it was bound by the revalued price of $600,000 which it felt it had to realize from the sale of Palmer. Baldt knew that Tabet did not intend to carry on the operation of Palmer in Massachusetts and estimated that it could realize $175,000 from the sale of the land and buildings located at Saugus, Massachusetts. In order to gross $600,000 from the sale, Baldt had to realize $425,000 from the sale of the remaining assets of Palmer. Since Tabet was aware of the original purchase price of $2 million paid by Baldt for Palmer, Baldt reasons, Tabet must have clearly understood that the only way Baldt would sell Palmer at this vastly reduced price was to sell the entire business, excluding only the land and buildings at Saugus. Thus, Tabet would have to assume liabilities as well as assets.

The guarantee contained in Paragraph 2.3,[7/] Baldt alleges, arose out of [illegible]e Tabet's concern over three potential problem

areas: (1) that cash coming into the business not be siphoned off; (2) that no undue purchases of materials take place, thereby creating excessive accounts payable; and (3) that all accounts receivable remain in the operating unit. In Baldt's view these were legitimate concerns, and it was out of these concerns that the guarantee contained in Paragraph 2.3 arose. To protect against unreasonable shifting in the balances of these accounts during the time span from May 31 to June 30, Baldt provided the equation contained in Paragraph 2.3 and added the set-off provisions in the last two notes to back it up. The fact that there was a $27,000 excess of "Cash" and "Accounts Receivable" over "Accounts Payable" at May 31 was of no concern, Baldt maintains, since the continual downtrend in the business would be expected to consume this excess and perhaps more.

It is plaintiff Baldt's position that Mr. Hollyer detailed the constituent elements of each of the balance sheet line entries for Tabet's representatives and, further, that Mr. Hollyer answered all questions and supplied all information requested by Tabet. Specifically, Baldt contends that Mr. Hollyer evidenced the special attention which he gave to those items in Paragraph 2.3 by a mark on the draft which was his way of reminding himself of matters requiring special attention. Baldt concludes by stating that while many changes were made in the Agreement and while much discussion took place with regard to Paragraph 2.3, that Paragraph was unchanged from draft to final form.

Tabet's Allegations

Tabet maintains that it had no intention of continuing the business of Palmer in Massachusetts. Therefore, it had no need for the land and buildings of Palmer. Further, Tabet alleges that it had no interest in the soft assets (the cash, accounts receivable, etc.) of Palmer, but was only interested in the hard assets (the machinery, equipment, and inventory). In fact, the only assets valued in arriving at the purchase price of $425,000 were the hard assets. Tabet felt that $425,000 was its upper limit--no higher price could be justified in this instance. Tabet states that this was the top figure it was prepared to pay <u>to Baldt</u>, although it did envision other related expenses.

It is Tabet's contention that the assumption of the soft assets and the liabilities of Palmer was agreed to purely as an accommodation to Baldt. As such, Tabet would not have acquiesced if it had felt that this accommodation was going to cost anything over and above the $425,000 purchase price. This possibility, Tabet maintains, was its greatest concern.

It was Tabet's understanding that the term "Accounts Payable" as used in Paragraph 2.3 included the three current liability line entries labeled "Accounts Payable", "Salaries, Wages and Other Compensation", and "Payroll Taxes and Payroll Withholdings". Employing this interpretation of "Accounts Payable", the

equation employed in Paragraph 2.3, based on the balance sheet of May 31, would result in a "wash-out" with "Cash" and "Accounts Receivable" roughly equal to "Accounts Payable". 8/ This interpretation, Tabet maintains, is fully consistent with its position that this accommodation not add any cost to the purchase price; and the provision for set-off in the last two notes was added expressly to protect against Tabet being harmed by any fluctuation from this "wash-out" situation. Tabet deemed this reserve of $31,250 to be adequate under these circumstances. Tabet cites three check marks placed on a copy of the May 31 balance sheet by Mr. Mastracco as evidence that this interpretation was mutually understood by the parties. These check marks were placed next to the three current liability line entries while Mr. Mastracco was questioning Mr. Hollyer regarding the elements included in Paragraph 2.3. Tabet concludes by stating that it was bound by the $425,000 ceiling going into the negotiation, and that it would have been impossible to adhere to this ceiling if it had been forced to make additional outlays of cash as a result of this accommodation of Baldt.

Analysis

Where the jurisdiction of this Court arises in diversity, the interpretation of the contract and the rights thereunder depend on state law. Merritt-Chapman & Scott Corp. v. Public Utility Dist. No. 2, 237 F. Supp. 985 (S.D.N.Y. 1965). Here

the parties have validly stipulated[9/] that the law of the State of New York shall govern for all purposes in disputes arising under the Agreement. Meltzer v. Crescent Leaseholds, Ltd., 315 F. Supp. 142 (S.D.N.Y. 1970), aff'd, 442 F.2d 293 (2d Cir. 1971); B.M. Heede, Inc. v. West India Machinery and Supply Co., 272 F. Supp. 236 (S.D.N.Y. 1967).

The Agreement herein has been reduced to a writing and contains a valid integration clause.[10/] Thus extrinsic evidence would not normally be admitted to alter or vary the terms of the written instrument. Leumi-Financial Corp. v. Richter, 17 N.Y.2d 166, 269 N.Y.S.2d 409, 216 N.E.2d 579 (1966); Sabo v. Delman, 3 N.Y.2d 155, 164 N.Y.S.2d 714, 143 N.E.2d 906 (1957). However, where an ambiguity is found to exist, parol evidence is admissible to resolve the ambiguity. Nathan v. Monthly Review Press, Inc., 309 F. Supp. 130 (S.D.N.Y. 1969); Tramco Industries, Inc. v. Broad Hollow Associates, 30 A.D.2d 522, 290 N.Y.S.2d 260 (1st Dep't 1968), aff'd, 23 N.Y.2d 841, 297 N.Y.S.2d 739, 245 N.E.2d 403 (1969). In a previous opinion in this case[11/] denying plaintiff's motion for summary judgment, it was held that "the terms 'Accounts Payable' and 'Palmer Liabilities' are ambiguous and that a triable issue of fact exists."[12/] Therefore, the admission of extrinsic evidence to cure this ambiguity is proper.

The Purchase and Sales Agreement was prepared by the Baldt people. Mr. Hollyer testified that it was his practice to use capital letters and quotation marks whenever he wanted to

indicate the quotation of specific line entries from a statement. Mr. Burton admittedly noticed the capital letters and quotation marks used in Paragraph 2.3, but raised no question as to their usage. Nor did Mr. Burton question the fact that this usage and punctuation appears nowhere else in the documents, though once again he admitted his awareness of this fact. Similarly, Burton admitted at trial that he noticed the final sentence in Paragraph 2.3 referring to the maintenance of accounts, but once again he raised no question with regard to it.

Both plaintiff and defendant seem to agree that the terms "Cash" and "Accounts Receivable" as used in Paragraph 2.3 indicate the specific corresponding line entries on the May 31 and June 30 balance sheets. Absent evidence to the contrary, consistency would demand that the term "Accounts Payable" also indicate the corresponding balance sheet line entry. Tabet's contention that the term "Accounts Payable" includes not only the line entry "Accounts Payable", but also the line entries "Salaries, Wages and Other Compensation" and "Payroll Taxes and Payroll Withholdings" is not persuasive. There are a dozen line entries listed under Current Liabilities on these balance sheets. There is no plausible explanation nor rationale offered to explain why only these three entries and no others are to be included under the heading "Accounts Payable".

This Court finds that Tabet was well aware that [illegible] was selling Palmer at a vastly reduced price. Also, implicit

in Tabet's purchase was the removal of a prime competitor. The result of these factors was the placement of Baldt in the position of strength in the negotiation. Simply stated, Baldt was in a position to sell as much or as little of the business as it wanted and Baldt did, in fact, force Tabet to assume certain liabilities. This Court, however, is not convinced that the equation contained in Paragraph 2.3 derived from this bargaining situation nor that Paragraph 2.3 was the manifestation of any "accommodation" by Tabet. To the contrary, Baldt's theory is much more credible in light of the facts disclosed. From the evidence presented this Court must conclude that Tabet was concerned about the shifting of funds and the undue purchase of materials prior to the closing, and that the equation found in Paragraph 2.3 was set up to protect Tabet against this eventuality. Both parties were well acquainted with the deteriorating state of the business of Palmer. Both parties knew or should have known that the $27,000 excess of "Cash" and "Accounts Receivable" over "Accounts Payable" would be eroded, if not entirely consumed, as the downtrend in Palmer's business continued. The set-off provisions in the last two notes were merely an added protection in case the downtrend further accelerated. Any "accommodation" claimed by Tabet was actually the result of Baldt's superior bargaining position and Baldt's insistence that liabilities, as well as assets, be assumed.

The conduct of the negotiations lends further weight to

this interpretation. It is undisputed that Mr. Hollyer answered all questions posed by the Tabet people and complied fully with all of Tabet's requests for information. Both parties testified that the documents in question were discussed in detail and several changes were incorporated into them. It is notable, however, that while all of the relevant discussion regarding Paragraph 2.3 took place prior to the signing of the Agreement, thereby affording ample opportunity for amendment, the Paragraph was not altered in any way from draft to final form. Also notable is the absence of any testimony that any amendment was even <u>suggested</u>. As the Court stated at trial:

> "I notice in the draft of July 6 there are quite a number of notations or changes. There is no change made with respect to this particular item [Paragraph 2.3] and it seems to me it would have been a very simple matter to be a little more specific, just like there was further specification on 2.3 on another part of the contract.
>
> "This was a matter that was important to both sides and apparently Mr. Hollyer made notations on the draft alongside of it with particular reference to the cash, accounts receivable and accounts payable and no change was made by anybody with respect to this."<u>13</u>/

Mr. Hollyer testified that he made a "squiggle" in the margin of the Agreement next to Paragraph 2.3. This was his mark, his method of indicating to himself that he wanted to be sure to cover an area with emphasis in subsequent discussions. Mr. Hollyer was before the Court, was subject to cross-examination, and consequently his testimony must be given much weight. Mr.

Burton, on the other hand, testified that Mr. Mastracco had placed check marks next to the three current liability line items on the May 31 balance sheet which Tabet contends were included in "Accounts Payable". Both of these marks--Hollyer's squiggle and Mastracco's check mark--are in themselves neither distinctive nor communicative. Mr. Hollyer was present to give testimony regarding the meaning of his mark. Mr. Mastracco, while still alive and still in the employ of Tabet, was not called to testify regarding the meaning of his mark. Consequently, Burton's testimony must be given relatively little weight.[14/]

Finally, Burton testified that $425,000 was the absolute maximum that Tabet was willing to pay for Palmer. This being the case, it would have been a matter of relative ease to insert a simple clause fixing this upper limit, yet this was not done.

In conclusion, this Court is convinced that the term "Accounts Payable", as used in Paragraph 2.3 of the Agreement, refers to the current liability line entry also labeled "Accounts Payable" on the May 31 and June 30 balance sheets. The broader interpretation suggested by Tabet is without substantial force.

Accordingly, judgment is granted in favor of plaintiff as set forth in the Stipulation and Order signed in this Court on July 29, 1974, in the amount of $46,875.00 less an offset of $4,477.85, leaving a total of $42,397.25, plus (a) $959.33 as interest previously due, (b) $6,916.03 as interest on the prin-

cipal due from August 15, 1972 until May 15, 1974, the last date upon which interest was computed, and (c) interest on the principal in the amount provided for in the notes from May 15, 1974 through the date judgment is entered herein.

So ordered.

Dated: New York, New York

December 24, 1974

Charles M. Conway

U.S.D.J.

[illegible] CORPORATION,
Plaintiff,
-against-
TABET MANUFACTURING CO., INC.,
Defendant.

73 Civ. 661 (CHT)

FOOTNOTES

1/ Tr. at 7:

> "Q: At that time, Mr. Hollyer, who was [sic] your largest competitors?
>
> A: The larges[t] competitor was Tabet Manufacturing. There was a company called Nelson that competed to a somewhat lesser degree and also a company called Betts which went out of business roughly in that period."

2/ Pl.'s Exh. 1, at 3-4.

3/ Tr. at 33-34. The parties here discussed Paragraph 9.5 of the Agreement.

4/ The parties have agreed that interest is still due and owing on these notes in the amount of $959.83.

5/ See Exh. B and Exh. C appended to plaintiff's Notice of Motion for Summary Judgment in Lieu of Complaint.

6/ Pl.'s Exh. 1, at 4.

7/ Pl.'s Exh. 1, at 4:

> "In the event that the 'Cash' and 'Accounts Receivable' of Palmer transferred to the Company do not equal or exceed the 'Accounts Payable' of Palmer as at June 30, 1971, then the difference between the 'Accounts Payable' of Palmer and the 'Cash' and 'Accounts Receivable' of Palmer as at such date shall be deducted from the principal amount due under the Notes in inverse order of their maturity."

FOOTNOTES
ii

3/ Pl.'s Exh. 3:

"Cash	20	
Accounts Receivable	103	
	123	
Accounts Payable		96
Salaries, Wages and Other Compensation		20
Payroll Taxes and Payroll Withholdings		5
		121"

9/ Pl.'s Exh. 1, at 16, Paragraph 9.9.

10/ Pl.'s Exh. 1, at 14, Paragraph 9.5.

11/ Baldt Corporation v. Tabet Manufacturing Company, Inc., 73 Civ. 661 (S.D.N.Y., filed June 20, 1973).

12/ Id. at 6.

13/ Tr. at 73.

14/ "The rule in respect of failure of a party to produce oral evidence is that such failure is a fact to be considered in determining how much weight, if any, should be given to the evidence which he has produced." Reehil v. Evans, 129 App. Div. 563, 114 N.Y.S. 17 (2d Dep't 1908), rev'd on other grounds, 197 N.Y. 64, 90 N.E. 340 (1910).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U. S. DISTRICT COURT FILED JAN 31 1975 S. D. OF N. Y.

196a

75,106

BALDT CORPORATION, Plaintiff,

-against-

TABET MANUFACTURING CO., INC., Defendant.

JUDGMENT #75,106

73 Civ. 661 (CHT)

This action having come on for trial before the Court, Honorable Charles H. Tenney, District Judge, presiding, and the issues having been duly tried and an Opinion and Order having duly been rendered,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff, Baldt Corporation, recover of defendant, Tabet Manufacturing Co., Inc., the sum of $42,397.25 plus interest, as set forth in the Stipulation and Order signed by this Court on July 29, 1974, the interest being (a) $959.83 as interest previously due, (b) $6,916.03 as interest on the principal due from August 15, 1972 until May 15, 1974, (c) $1,623.33 as interest on the principal due from May 15, 1974 until November 15, 1974 and (d) interest on the principal in the amount provided for in the notes (i.e., one point above the "Floating Prime Rate" for short-term prime commercial borrowing at Chemical Bank, New York, New York as computed on the day judgment is entered herein) from November 15, 1974 through the date judgment is entered herein, and also recover its costs in this action.

Dated: New York, New York
January 30th 1975

Charles H. Tenney

United States District Judge

JUDGMENT ENTERED

DOCKETED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------X

BALDT CORPORATION, : 73 Civ. 661 (CHT)

Plaintiff, :

-against- : NOTICE OF APPEAL

TABET MANUFACTURING CO., INC., :

Defendant. :

-----------------------------X

PLEASE TAKE NOTICE that Tabet Manufacturing Co., Inc., the defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final Judgment entered in this action on January 31, 1975, and please take further notice that the defendant hereby appeals from each and every part of said Judgment.

Dated: February 28, 1975

REAVIS & McGRATH

By James Nagle
A Member of the Firm
Attorneys for Defendant
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TO: OLWINE, CONNELLY, CHASE
O'DONNELL & WEYHER
Attorneys for Plaintiff
299 Park Avenue
New York, New York 10017

ONE (1) COPY
Service of ~~three (3) copies~~ of the within
JOINT APPENDIX is hereby admitted

this 15th day of May 1975

Olwine Connelly Chase O'Donnell & Weyher
Attorney(s) for Plaintiff-appellee